TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 1221

H. E. CROCK COMPANY, INC., APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED JULY 3, 1926.

(30,463)

(30,463)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 498

H. E. CROOK COMPANY, INC., APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 30, 1924

[fol. 1]

IN THE

UNITED STATES COURT OF CLAIMS

No. B-194

H. E. CROOK COMPANY, INC., a Corporation, Claimant,

vs.

THE UNITED STATES, Defendant

I. PETITION.—Filed Sept. 16, 1922

To the Honorable the Justices of the Court of Claims:

The Claimant, H. E. Crook Company, Inc., a corporation organized and existing under and by virtue of the laws of the State of Maryland, respectfully shows:

I

That pursuant to advertisement and competitive bidding according to law, the plaintiff and defendant entered into a formal written contract with bond dated August 14, 1917, and known as Bureau of Yards and Docks contract No. 2466, a copy of which is hereto [fol. 2] annexed and made a part hereof, by the terms of which contract and bond, the claimant obligated itself to furnish, among other things, all labor and material and install two heating systems, one in the foundry building and one in the machine shop building, as such buildings were being erected by the Navy Department in the Navy Yard, Norfolk, Virginia, and the Navy Department obligated itself to proceed promptly with the erection of said foundry and machine shop buildings; and to provide outside hot water flow and the return pipes in tunnel to building lines; and of necessity to give claimant reasonable access to the site for the work; and to permit claimant to proceed without interference with the installations contemplated by the contract.

II

That in said contract the claimant agreed to complete said work within two hundred (200) calendar days from the date a copy of said contract was delivered to it. The said contract being delivered to the claimant on the 31st day of August, 1917, the completion date contemplated by the contract was March 19, 1918.

III

That thereafter in accordance with the terms of said contract the claimant procured the necessary materials to be used in the said in-

stallation of the said heating systems, furnished the necessary equipment and skilled operatives, employed the necessary labor, and proceeded with the work of said installation as rapidly as possible, except insofar as claimant was prevented from doing so by the acts and failures of the Navy Department hereinafter set forth.

IV

That contrary to its said agreement the Navy Department failed [fol. 3] to give claimant reasonable access to the site for the performance of the work and failed to erect the foundry building and machine shop building and failed to provide the piping in tunnel within the time agreed upon, nor did the Navy Department permit the claimant to proceed with the installation of said heating systems as was contemplated by the contract. Due to the failure of the Navy Department to properly complete portions of the buildings within the time contemplated by the contract, the claimant was prevented from commencing and proceeding with the installation of said heating systems in the foundry building until to-wit, May 27, 1918, and in the machine shop building until to-wit, October 28, 1918, which was long after the time contemplated for the completion of the contract. Due to the failure of the Navy Department to complete the piping to the building line until to-wit March 1, 1919, the claimant was prevented from making connections and tests required under the contract until after said date. As a result of all the aforesaid delays on the part of the Navy Department and sundry other delays resulting therefrom, the claimant's work was delayed and the claimant was prevented from completing the contract until on or about April 10, 1919.

V

That by reason of all the aforesaid delays on the part of the Navy Department, the claimant was greatly damaged and put to great additional expense in connection with the installation of said heating systems as follows:

(a) The cost of labor was greatly increased after the expiration of the period during which it was contemplated that the contract would be performed, and the net increase in cost to the claimant of labor employed in the work by reason of advance in wages after March [fol. 4] 19, 1918, and for which claimant has not been reimbursed, amounted to $6,420.30 ..... $6,420.30

(b) The claimant was compelled to and did keep a superintendent and time-keeper on the work for the additional time required to complete the contract at an actual cost to it of $95.00 per week, or a total additional expense of $5,442.10 for 57 2/7 weeks..... 5,442.10

(c) That the claimant was forced to pay an additional premium on the bond executed for the faithful performance of the contract, for the extra time required to complete the said installation of said heating systems, which additional bond premium was an added cost to the claimant of	719.45
Total	$12,581.85
(d) Reasonable overhead 10%	1,258.18
Total	$13,840.03
(e) Reasonable profit 10%	1,384.00
	$15,244.03

VI

The said services were actually performed and were reasonably worth the amounts charged therefor, and the amounts stated were necessarily and actually expended by the claimant in connection with said contract and the claimant has received no payment therefor. There is therefore due the claimant on said account the total sum of $15,224.03.

[fol. 5]

VII

The claimant is the only person owning or interested in the claim above set forth and no assignment or transfer of the same or any part thereof or interest therein has been made. The claimant is justly entitled to receive and recover from the United States for and on account of said damage, the sum of Fifteen Thousand Two Hundred Twenty-four Dollars and Three Cents ($15,244.03).

VIII

The claimant has made due demand upon the United States for the payment of said sum, but the said sum had not nor has any part thereof been paid. The claimant has always borne true allegiance to the Government of the United States and has not in any way aided, abetted or given encouragement to rebellion against it.

Wherefore, the claimant prays for a judgment against the United States in the sum of Fifteen Thousand Two Hundred Twenty-four Dollars and Three Cents ($15,224.03) and for such further relief as this Honorable Court may grant, both at law and in equity, in the premises.

H. E. Crook Company, Inc., by Howard E. Crook, President.

Jurat showing the foregoing was duly sworn to by H. E. Crook omitted in printing.

[fol. 6] EXHIBIT A TO PETITION

This contract, of two parts, made and concluded this 14th day of August, A. D. 1917, by and between H. E. Crook Co., a corporation of the State of Maryland, having an office and place of business at No. 28 Light Street, Baltimore, Maryland, party of the first part, and The United States, party of the second part,

Witnesseth, That the said party of the first part and the said party of the second part do covenant and agree to and with each other as follows:

First. For and in consideration of the payments to be made as hereinafter provided the party of the first part will furnish, deliver and install two heating systems, one in the Foundry Building, and one in the Machine Shop at the Navy Yard, Norfolk, Virginia, in accordance with the provisions of specification No. 2466, as contemplated by Item 1, paragraph 54, thereof.

Second. Said specification No. 2466 and the General Provisions and drawings therein mentioned, and the Instructions Relative to Factory Inspection mentioned in the said General Provisions, are appended hereto and form a part of this contract.

Third. The standard specifications mentioned in paragraph 11 of said specification No. 2466 are on file in the office of the officer in [fol. 7] charge of the work and are to be considered as forming a part of this contract with like effect as though included herein.

Fourth. It is agreed and understood that the work to be done under this contract shall be completed within two hundred (200) calendar days from the date a copy of this contract is delivered to the party of the first part.

Fifth. It is also agreed and understood that the equipment to be furnished by the party of the first part under this contract, as provided in paragraph 56 of specification No. 2466, contemplates the furnishing of equipment as manufactured and sold by the following firms:

Fans—American Blower Company;
Heaters—American Radiator Company;
Motors—Westinghouse or General Electric Company;
Gate Valves—Crane Co., or Fairbanks Company;
Thermometers—Hohman and Maurer Company;
Gauges—Ashcroft Mfg. Company.

Sixth. For and in consideration of the faithful performance of this contract the party of the first part shall be paid, upon vouchers prepared, certified and approved in the usual manner and payable through such navy pay office as the party of the second part may elect, the sum of seventy one thousand nine hundred and forty-five dollars ($71,945.00), in the manner provided in the specification aforesaid.

Seventh. Neither this contract nor any interest therein shall be transferred by the party of the first part to any other party or parties.

Eighth. No Member of or Delegate to Congress, nor any person holding any office or appointment under the Navy Department, is, or shall be, admitted to any share or part of this contract or to any [fol. 8] benefit to arise therefrom: Provided, That this provision shall not be construed to extend to this contract if the same is made by an incorporated company for the general benefit of such company.

In the performance of this contract no person shall be employed who is undergoing sentence of imprisonment at hard labor imposed by a court having criminal jurisdiction.

In witness whereof, the said parties hereto have hereunto set their hands the day and year first above written.

H. E. Crook Co., Inc. Howard E. Crook, President. W. L. Handy, Secty. The United States, by F. R. Harris, Chief of the Bureau of Yards and Docks, acting under the direction of the Secretary of the Navy. (Seal.)

Witnesses: S. Gordon Hopkins, Frank H. Haines; C. D. Thurber, as to signature of F. R. Harris, Chief of the Bureau of Yards and Docks.

O. K. G. E.

[fol. 9] Specification No. 2466, for Heating Systems for Foundry and Machine Shops at the Navy Yard, Norfolk, Va., under Appropriation No. 124, "Improvement and Equipment of Navy Yards for the Construction of Vessels"

General Provisions

1. The general provisions entitled "General Provisions Forming Part of Specifications for Contracts for Public Works, Bureau of Yards and Docks, August 1, 1916," amended by "Addendum No. 1," shall form a part of this specification and of any contract based hereon. Copies of the said "General Provisions," amended, may be had on application to the Chief of the Bureau of Yards and Docks or to the commandant of any naval yard or naval station.

Special Provisions

2. General Intention.—It is the declared and acknowledged intention and meaning to provide and secure the installation of plenum systems of heating in each building, together with direct radiation in certain parts of buildings where indicated on drawings. The foundry and machine shop buildings are now being erected. The approximate contract, date of completion for the foundry is March 17, 1918, [fol. 10] and for the machine shop is February 15, 1918. It is intended that the contractor for the heating shall work in conjunction with the general contractors to obtain the best possible results with the least interference or delay. The heating systems shall be completed on or before the contract dates for the completion of the buildings.

3. General Description.—The systems shall include motor-driven fans, heating stacks, foundations and supports, casings, air ducts, direct radiation, piping, valves, and fittings. The main portions of buildings shall be heated by plenum system, and the toilets, washroom, storerooms, and offices by a combination of the two systems. Hot water will be the heating medium.

4. Locations.—The heating systems shall be located in the machine shop and foundry at the navy yard, Norfolk, Va., approximately as shown on drawings. Exact locations will be determined by the officer in charge.

5. Time of Completion.—The foundry heating system shall be completed on or before March 17, 1918. The machine shop heating system shall be completed on or before February 15, 1918.

6. Damages for delay in accordance with the provisions of paragraph 13 of the "General Provisions," amended, shall be at the rate of $20 per calendar day for each building.

7. Night Work.—If the contractor desires to carry on work at night or outside the regular naval station hours, he shall make application to the officer in charge in ample time to enable satisfactory arrangements to be made by the Government for inspecting the work in progress. If granted permission, he shall light the different parts of the work in a manner satisfactory to the officer in charge and shall comply with all naval station regulations.

8. Work to be Done and Material to be Furnished by the Govern- [fol. 11] ment.—The Government will provide the following: Outside hot-water flow and return pipes in tunnel to building line and all wiring up to main switch of each motor.

9. Government Utilities Available.—So far as the capacity of the Government plant and the demands of the Government service will permit, the contractor may obtain electric current for power and light, fresh and salt water from the yard supply, and may use the railroad tracks and rolling stock of the yard system and yard hoisting appliances, paying for the utilities at prevailing Government rates. The Government will furnish and install one meter, one switch, and, in case alternating current is provided, one transformer for electric current, and one water meter and shut-off for fresh and salt water mains within the limits of the area assigned to the contractor. The contractor shall provide, maintain, and repair all further wiring, poles, lamps, and accessories and all further piping and fittings required to transfer the electric current and water to the different parts of his work. Compressed air may be obtained where available at prescribed rates. The Government will assume no liability for the failure of the supply of any of the above-mentioned utilities.

10. Drawings Accompanying the Specification.—The following drawings accompany this specification and shall form a part of the contract. Said drawings are the property of the Government

and shall not be used for any purpose other than that contemplated by this specification:

Bureau serial No.	Sheet No.	Showing—
70231	1 of 6	Heating plans, foundry.
70232	2 of 6	Heating sections, foundry.
70233	3 of 6	Details of heating in foundry.
70234	4 of 6	Heating plans, machine shop.
70235	5 of 6	Heating sections, machine shop.
70236	6 of 6	Details of heating, machine shop.

11. Standard specifications, as follows, are referred to in this specification. Copies may be obtained upon application to the Chief of the Bureau of Yards and Docks:

[fol. 12]

Number	Date	Title
59C2c	Feb. 1, 1916	Concrete and mortar and materals.
59C1	Apr. 15, 1912	Portland cement.
48S1b	May 1, 1915	Structural steel work.
17M2b	Mar. 1, 1916	Induction motors.
47S10a	June 1, 1916	Steel sheet, plain black, or galvanized.
33P8b	Nov. 1, 1915	Packing sheet rubber cloth insertion.
52V2a	Sept. 1, 1914	Demar varnish.
52L2a	Apr. 1, 1915	Lead, red.
52L1b	Mar. 1, 1915	Lead, white.
52O1a	Aug. 2, 1915	Oil, linseed, raw.
.....	Mar. 15, 1917	Bureau of Yards and Docks, standard specification for piping.

12. Warranty.—The contractor shall warrant the entire installation, and every part thereof, and shall furnish a written warranty satisfactory to the Chief of the Bureau of Yards and Docks that he will repair or replace all of the work, materials, and equipment which may prove defective or insufficient within one year after the acceptance of the entire installation.

13. Plans Required of the Contractor After the Contract is Awarded.—Before any material is installed the contractor shall submit for approval to the Chief of the Bureau of Yards and Docks detail drawings in quadruplicate of the following: Each heater; duct connections; the piping connections; the fans, housings, bearings, and drive. He shall also submit such other drawings as are required by paragraph 24 of the "General Provisions."

14. Samples Required of Contractor After the Contract is Awarded. —The contractor shall submit for approval to the officer in charge or to the Chief of the Bureau of Yards and Docks, as directed, samples of radiator valves, heat insulation, direct and indirect radiators, gate valves, gaskets, gauges and thermometers. He shall also submit

such other samples of materials as may be required, whether specifically called for or not. The approval or acceptance of such samples may be used in the finished work. Materials shall conform to samples. The approval or acceptance of such samples shall not preclude [fol. 13] the rejection of any material upon the discovery of defects previous to the acceptance of the completed work.

Materials and Workmanship

15. All materials and workmanship shall be of the best quality of their respective kinds unless ohter grades are specifically mentioned, and the acceptance of same is understood and agreed to be subject to the approval of the officer in charge.

16. All cement used in the work shall be in accordance with specification No. 59C1 referred to in paragraph 11.

17. All materials for concrete and mortar, including sand, broken stone, gravel, lime, water, and the methods of mixing and placing shall be in accordance with specification No. 59C2c, referred to in paragraph 11.

18. All steel and wrought or cast iron used in the work shall be in accordance with specification 4881b, referred to in paragraph 11.

19. All iron and steel for machinery, unless otherwise specified herein, shall be of the grades demonstrated by extended use to be best suited for the purposes which they will be required to serve. They shall be subject to all usual tests. In case of material taken from stock, a certified statement, satisfactory to the Chief of the Bureau of Yards and Docks, shall be furnished by the contractor to the effect that the materials supplied are of the grades conforming to the intent of this specification.

Design and Construction

20. General.—It is not the intent that the detailed specifications given below shall necessitate the furnishing of specially constructed [fol. 14] apparatus, it being the intention to secure a system composed of equipment as regularly manufactured and installed for the highest class service. The specific details are inserted to protect manufacturers of liberally designed and well-constructed apparatus from the necessity of reducing the quality of their product to meet the competition of overrated, less substantial, and less efficient apparatus.

The equipment to be furnished under this specification shall be worked into a convenient and economical system. When the system is declared ready for acceptance it shall be complete in every detail, and all work not specifically omitted under paragraph 8 shall be furnished. The accompan-ing drawings show the proposed location and the arrangement which is desired for the apparatus and piping.

The motors and blowers shall be subjected to shop inspection and tests, and authorization from the Bureau must be obtained before shipment is made. The equipment and material will be inspected upon delivery and shall be subjected to additional tests after installation as specified herein. These tests will be at the expense of the contractor, except the water and electric energy needed for actually operating the equipment, which will be furnished by the Government. The apparatus and material shall be constructed from detail drawings and specifications submitted for approval as soon as possible after the award of the contract and before any factory inspection is made. No changes shall be made from approved drawings unless specifically authorized. The name of the manufacturer of each part of the equipment offered shall be stated in the proposal, and it shall be clearly illustrated and described. Unless otherwise specified herein, all material and equipment subject to operation under a pressure other than atmospheric shall be tested at the place of manufacture with a cold hydrostatic pressure of at least double the maxi-[fol. 15] mum working gauge pressure and shall show no indications of weakness or defect.

21. Pipe.—All pipe shall be specified for steam piping in "Standard Specification for Piping," referred to in paragraph 11, class S.

22. Piping.—All pipes shall be cut accurately to measurements established from the building by the contractor, and shall be worked in place without springing or forcing. Expansion and contraction of piping shall be provided for by swing joints or offsets where possible and where same is not feasible by corrugated copper expansion joints reinforced with iron rings located where shown or as directed by officer in charge. Piping shall follow the general lines laid out on the drawings. The exact locations shall be such as will be entirely out of the way of moving equipment, doors, and windows in buildings, which locations will be estabished by the officer in charge.

23. Supports, etc.—All anchors, hangers, supports, sleeves, floor and ceiling plates shall be as required by "Standard Specification for Piping."

24. Heat Insulation.—All supply and return pipes less than 10 feet above floor, platform, or gallery shall be covered with insulating covering as specified in "Standard Specification for Piping, class S, with 8-ounce canvas jacket sewed on. Canvas to be drawn over end of covering and a ceiling flange placed on pipe to form a finish where covering terminates.

25. Valves.—Valves on main lines and at heater stacks shall be gate valves as specified for steam piping, class S, in the "Standard Specification for Piping." Valves on direct radiators shall be all metal packless union radiator valves, having the stem under atmospheric pressure throughout its entire length. Valves shall be rough body finished trimmings, nickel plated all over with renew-[fol. 16] able elastic disks and wood wheels. Valves will be required on supply and return connections to each radiator.

Each direct radiator and each section of indirect stacks shall be fitted with positive vent valves with lock shield and loose key.

26. Fittings, unions, and flanges shall be as specified in "Standard Specification for Piping," class S.

27. Gauges shall be of the single Bourdon spring-pressure type, having a 6-inch dial. The spring shall be a seamless-drawn tube. The movements and all interior parts shall be made of noncorrosive metal and designed to minimize vibration of the pointer. The sector shall have a wide face, and all spindles shall be provided with bushings having a long bearing surface. The figures on the dials shall be readily legible. The cases of the gauges shall be of iron, and the ring shall be of brass. A brass stopcock and a drain cock shall be provided and properly connected to each gauge. All piping and connections to the gauge shall be brass. Each gauge shall be graduated to at least 100 pounds per square inch in divisions not greater than 5 pounds each. All gauges shall be of the best material and workmanship and of an approved patent, and shall be tested at the place of manufacture to the limit of the pressure indicated on their dials. Each gauge shall be warranted accurate.

Gauges shall be installed on the supply and return pipes where same enter and leave each building.

28. Thermometers.—Shall be installed in main air duct leaving each fan, and in the fresh-air inlet connections to each unit in the foundry. Thermometers shall also be installed in the main supply and return pipes where same enter and leave each building.

Duct thermometers shall be of the air-duct type and shall have threaded connections. They shall be side angle, angle, or straight style, according to location. They shall be installed in such loca- [fol. 17] tions as to be easily read from the floor. The scale shall be 12 inches long, and shall be graduated from 0° to 160° F. The stem shall be 12 inches long, and shall be suitably protected from damage when handling or by foreign substances contained in the circulating air. The materials used shall be those best suited to the service for which the instruments are intended. The case shall be of bronze and shall be neatly finished. The stem shall be securely fastened to the case. The tube shall be secured in the stem by means of a gland which shall provide firm support to the tube and bulb. The socket shall be threaded for a 1-inch pipe-tap opening. A flange, 5 inches in diameter and tapped for the socket, shall be furnished and installed, where directed by the officer in charge, for each thermometer.

Thermometers in pipe lines shall be similar to above graduated 80° to 300° F. and provided with mercury-filled cups threaded for ½-inch pipe connections, which shall be screwed into pipe lines at locations to bring thermometer wells into direct contact with the current of water and in locations where same can be easily read.

29. Cleaning of Apparatus.—All radiators, housings, appliances, piping, and air ducts shall be cleaned thoroughly and prepared in a satisfactory manner for painting or insulating as specified. Should

any pipe or other part of any apparatus be stopped up by refuse after installation, the contractor shall disconnect, clean thoroughly, and reconnect whatever work has been disconnected for the purpose of locating and removing the obstruction, and he shall also repair any other work damaged by him.

30. Painting.—(1) Work required includes the furnishing of all materials and labor necessary to paint all metal work installed under this specification that is exposed in the building, and all pipe covering [fol. 18] and fans; also all surfaces which were painted originally and from which any of the paint has been removed as a result of the execution of the work required by this specification.

(2) Materials.—All materials shall be in accordance with the specifications for painting materials referred to in paragraph 11.

(3) Character of the Work.—All finished surfaces shall be left smooth, even, and free from any defects. All brush work shall show even coatings, free from brush marks, corduroy, or other defects. No coat of paint shall be applied until the undercoat is dry. No coat of paint shall be applied to damp or wet surfaces.

(4) Colors.—The colors of all paint work shall be selected by the officer in charge.

(5) Painting Galvanized-iron Work.—The surfaces of all galvanized iron shall be coated with a solution consisting of 2 ounces of copper chloride, 2 ounces of copper nitrate, 2 ounces of sal ammoniac in 1 gallon of soft, clear water, with 2 ounces of crude hydrochloric acid added after solution is completed. They shall then receive a priming coat of red lead and raw linseed oil and two finishing coats of white lead and raw linseed oil.

(6) Painting Pipe.—All pipes and fittings which are to be insulated shall be painted with one coat of an approved asphalt paint. This paint shall be thoroughly dry before any pipe covering is applied.

(7) Painting Pipe Covering.—The canvas jacket on pipe covering shall be painted with two coats of asbestos paint light colored.

(8) Painting Radiators and Exposed Piping.—All direct radiators and exposed piping shall be painted two coats of paint consisting of a mixture of zinc white ground in damar varnish, which shall be thinned with turpentine to a creamy consistency, to which shall be [fol. 19] added the necessary coloring matter and enough good pale baking varnish to make a glossy paint. Apply while pipes are cool and turn on heat slowly until paint is baked on.

(9) Painting Fans.—The fans shall be painted two coats of white lead and linseed oil colored as directed.

(10) Painting Motors.—Motors and compensators shall be painted at the factory in accordance with manufacturers standard finish. After erection all damaged surfaces shall be restored to original condition.

31. Plenum System.—The main portions of buildings shall be heated and ventilated by the plenum system. Machine shop shall be arranged to recirculate the air. Foundry shall be arranged to introduce fresh air or to recirculate the air as desired. The offices, tool rooms, toilet and locker rooms shall be heated by direct radiation supplemented by the plenum system.

The contractor shall furnish and work into place all apparatus, parts, material and accessories necessary for the complete installation of the system. The equipment and material will be inspected upon delivery. Upon the completion of the work, the contractor shall make an operating test of the entire installation, separately and collectively, to determine its compliance with the requirements of this specification. The Government will furnish the hot water and electric current necessary for these tests, but the contractor shall furnish all labor, instruments, and other material needed to carry out the tests to the satisfaction of the officer in charge. The contractor shall repair or replace any parts of the installation which prove defective or insufficient. The method and the work of installation shall be in accordance with the best practice and satisfactory to the officer in charge.

Work required includes the finishing and installing of 10 heating [fol. 20] and distributing units consisting of heater stacks, casings, fans, motors and controllers, foundations, distributing ducts, piping, valves, fittings, gauges, and thermometers.

32. Plenum Fans.—The plenum fans shall be multiblade or multivane type, full housing, with outboard bearings and overhung wheels. Five fans in machine shop shall be top vertical discharge. Four fans in foundry shall be top horizontal discharge. One fan in machine shop shall be bottom horizontal discharge.

The three fans in center of the machine shop and the four fans in the foundry shall each have a capacity to deliver not less than 43,000 cubit feet of air per minute at 140° F. against a static head of 1 inch water gauge with a peripheral velocity not exceeding 3,600 feet per minute. The three units along north wall of the machine shop shall each have a capacity to deliver not less than 27,000 cubic feet of air per minute at 140° F. against a static head of 1 inch water gauge with a peripheral velocity not exceeding 3,600 feet per minute.

33. Design.—The blower and housing shall be of liberal design, simple and durable, and shall be constructed to reduce eddy currents to a minimum and to permit the ready removal of the fan. The construction shall also provide a large air inlet and allow for high volumetric and mechanical efficiency. The wheel shall be rigid and well braced. The hub shall be a strong casting, keyed to the shaft, accurately machined, and shall present a smooth surface to the inflowing air. The back plate shall be securely riveted to the hub. The blades shall be concave, all of the same shape and form, and shall be securely riveted to the plates. The entire wheel shall be accurately balanced and shall run without vibration. The housing shall be built of steel plate of sufficient thickness to insure rigidity and stiffness. It shall be well braced and riveted to an angle and

[fol. 21] channel frame. Each fan shall have two bearings, which shall be extra long and of large diameter, giving ample bearing surface. They shall be self-aligning and easily adjusted for wear, and shall be lined with the best quality of babbitt metal. Each bearing shall be provided with an oil well of large capacity with an oil gauge glass and with two rings to feed the oil to the bearing surface. The shaft shall be of cold-rolled carbon steel having a key seat for the hub and provided with driving connections as specified in paragraph 34.

Driving sprocket shall be mounted between the bearings, and the overhung wheel.

Motors and Controllers

34. General Requirements.—The motors and controlling appliances for use in connection with the blowers shall be suitable for use with alternating current at 220 volts, 3 phase, 60 cycles. They shall be in accordance with specification No. 17M2b, referred to in paragraph 11, and shall be type A, class 1. Speed of motors shall not exceed 1,200 revolutions per minute. Each motor shall be connected to its blower by means of an approved silent chain drive, inclosed in a steel casing, and shall have sufficient power to drive the blower at the required speed.

The contractor shall furnish and install the wiring from the motors to the starting compensators. Wires shall be installed in rigid steel conduits. Wires shall be protected at pipe ends by means of condulets. All wires shall be rubber insulated and braided for 600-volt service. All electrical work shall be in accordance with the latest edition of the National Electrical Code. Each motor shall be provided with a starting compensator giving no voltage and overload release protection. The compensator shall have a conduit wiring case, and a metal inclosing cover for the relays and coils. Start-[fol. 22] ing equipment shall conform to Specification 17M2b. The main switch shall be inclosed in a metal case with hinged door.

35. Air Heaters.—Air heaters shall be cast iron, cored extension surface type, with sections held together by hexagonal cast iron right and left nipples or bolts. Heaters shall consist of sections approximately 50 inches and 72 inches high and 9 inches deep and shall be assembled one and two tiers high and 5 inches on centers. Lower tier of heaters shall rest on 8-inch channels and a piece of steel pipe shall be placed between the upper and lower sections.

The heater sections shall be connected as indicated on drawings, and each group shall be provided with gate valves on the supply and return connections. Drain valves with hose nipples and vent valves as specified under paragraph 25 shall be provided for each group of heaters.

36. The housings for the heaters and the connections between heaters and fans shall be constructed of No. 12 gauge sheet steel braced with 2 by 2 inch angle stiffeners spaced not more than 30 inches apart and with angle runners at floor and top of housings.

Water will be delivered to the heaters under a pressure of approximately 45 pounds per square inch and at a temperature of 250° F. in extreme weather.

Air Ducts

37. Size.—The main and branch distributing ducts shall generally be of the size indicated on drawings. In the event that structural conditions prevent the installation of ducts of the dimensions shown other cross sections of equal area shall be installed as directed by the officer in charge.

38. Construction.—The air ducts shall be constructed throughout of galvanized sheet steel guaranteed to double seam without showing [fol. 23] fracture. Jointing of ducts shall be as follows:

Rectangular Ducts

Longest dimension	Joint between sections	Corner joints
Up to 24 inches	Slide joint	Double lock seam.
25 to 40 inches	Standing seam	Do.
41 inches and over	Angle-iron corners	Angle-iron frames forming flanges.

Round Ducts

Diameter	Girth joint	Longitudinal joint
Up to 24 inches	Slip joint riveted	Rivet and solder.
25 to 40 inches	Swedge and wire riveted.	Do.
41 to 60 inches	Angle-iron flanges	Do.

39. Weight of Sheets.—The weight of the sheets forming the ducts shall not be less than shown in the following table:

Diameter, inches, on longest side	Weight per square foot after galvanizing
0-15	0.906
16-24	1.156
24-36	1.406
37-48	1.656
49-61	2.156

40. Hangers and Supports.—All ducts shall be supported from crane rail girders, lattice-wall girders, roof trusses, and other structural members. Round ducts shall have sheet-metal bands, same weight as duct, encircling the duct. Rectangular ducts shall have 1-inch pipe supports under ducts with hangers on each side. This contractor shall drill all necessary holes in structural work for the reception of hangers, and where necessary shall provide brackets secured to the framing for the support of ducts, as directed by officer in charge. Supports shall be not over 8 feet apart.

41. Deflectors.—Sheet-metal deflectors shall be placed in main ducts at points where branches are taken off, to insure a uniform distribution of air in the various branches. These deflectors shall [fol. 24] be installed with extension wires to outside of duct, which wires shall be soldered fast and cut off flush with outside of duct after deflectors are properly adjusted.

42. Volume Dampers.—Adjustable dampers shall be placed on all discharge openings to regulate the discharge of air. The dampers shall be operated by levers, each having a ratchet which shall securely hold the dampers in any position. The levers shall extend to a point 6 feet above the main shop or gallery floor.

43. Switch Dampers.—Balanced louver type dampers shall be installed in fresh-air and recirculating inlets to foundry heaters as shown on plans.

Dampers shall be constructed of No. 12 steel with 2 by 2 inch channel frames. Dampers shall have heavy wrought-iron rods in leaves, bushed or ball bearings, with approved heavy pattern operating levers and quadrants to secure same in any desired position.

44. Inspection Doors.—Housings of heaters in foundry shall have doors for access to inlet side of heaters constructed of No. 12 gauge sheet steel reinforced with 1½ by 1¼ inch continuous angles bent around corners and riveted or welded at meeting. Doors shall have heavy strap hinges and two approved fastening devices.

45. Inlet Louvers.—Air intakes for heaters in foundry shall be provided with louvers giving necessary free air space.

Louvers shall be constructed of 16-ounce best grade rolled copper sheets of uniform thickness and full weight. It shall be tough and ductile, without cracks or flaws, and shall stand repeated bending with or across fiber without splitting or breaking.

Louvers shall be of approved standard design and shall be reasonably rain-tight. All structural shapes necessary to install louvers in the space designed to receive metal sash of monitors shall be pro- [fol. 25] vided and installed by this contractor. Detail drawings showing the design and construction of louvers shall be submitted for approval before getting out any work on louvers.

Pipe Work

46. The contractor shall install all pipe work from point of entrance to the building of hot-water supply and return pipes to all heaters and direct radiators shown or noted on drawings, with all valves, fittings, etc., shown on drawings or required for a complete working system.

Pipe valves, fittings, unions, and gaskets shall be as hereinbefore specified in paragraphs 21, 22 and 23.

Foundations

47. The contractor shall furnish all of the necessary material for and shall build foundations with the necessary foundation bolts for three heaters, blowers, and motors on north side of machine shop. The foundations shall be of concrete and the exposed surfaces shall be of uniform color and even appearance, free from pits, fins, grain marks, stains, and inequalities of mixture. Care shall be taken in depositing the concrete to spade between the concrete and the forms to bring the finer portions to the surface. Every effort shall be made to avoid visible lines of juncture between the concrete deposited at different times. The forms shall be removed while the concrete is still green and the faces shall then be rubbed down and thoroughly floated with a wooden float, using a 1 to 2 cement mortar grout, applied with a whitewash brush. Surfaces shall be kept wet until the concrete has set thoroughly. In no case shall any loose material be left on the finished surfaces.

Two units—heater fan and motor—in foundry shall rest on the galley floor, and no foundations will be required.

[fol. 26] Two units—heater fan and motor—in foundry and three units in machine shop shall be supported on platforms resting on structural members provided by the Government. This contractor shall provide floors for platforms constructed of ¼-inch thick diamond-checkered deck plate and railings, constructed of 2-inch steel pipe and malleable-iron railing fittings and floor flanges. Contractor shall provide ladders for access to platforms, constructed with 2 by ⅛ inch running sides and ¾-inch rungs, giving 16-inch foot room.

Contractor shall furnish structural shapes to bring heaters to proper level where necessary.

Direct Radiation

48. Work required includes furnishing and installing a complete forced circulation hot-water heating system in the toilets, wash rooms, offices, and other small rooms in the lean-to portions of the machine shop and a similar system in the toilet and locker room and office in the foundry complete with connections to the hot-water supply and return mains.

All radiators, piping, fittings, valves, connections for supply and return mains, and all other apparatus, parts, materials, and accessories necessary to an efficient heating system shall be furnished and installed whether or not specifically mentioned herein. The system proposed for installation must be simple in construction, installation and operation, and provide a perfect circulation, control, and distribution of hot water at a pressure of approximately 45 pounds at the radiators and a temperature of 250° F. in extreme weather.

49. Radiators.—Shall be plain pattern cast-iron hot-water type, of the sizes, heights, and columns noted on the drawings. Column [fol. 27] radiators shall have leg sections at each end and center

legs on radiators containing more than 14 sections. Joints between sections shall be made with screw nipples. Locations of radiators shown on drawings are approximately correct, but slight modifications shall be made to accommodate radiators to the location as directed by the officer in charge.

50. Pipe.—All pipe shall be in accordance with the "Standard Specification for Piping," class S.

51. Piping.—Piping shall be installed in approximately the locations shown on drawings, but slight modifications from same may be required to accommodate the same to the building and shall be made if required by the officer in charge.

52. Valves and Fittings.—Gate valves shall be installed in the supply and return lines where indicated on the drawings. All fittings, unions, and gaskets shall be as called for in "Standard Specification for Piping," class S.

Radiator valves and air valves shall be as called for in paragraph No. 25.

Proposals

53. Certified Check and Bond.—Each proposal must be accompanied by a certified check, payable to the Chief of the Bureau of Yards and Docks, for the sum of $2,500, as a guaranty that the bidder will not, without cause, approved by the Chief of the Bureau of Yards and Docks, withdraw his bid, and that, if awarded to him, he will execute the required contract within 10 days after its delivery to him for that purpose, and give a bond (preferably that of a first-class surety company) in a penal sum equal to 30 per cent of the contract price, conditioned upon the faithful performance of the contract. This bond is not required with the proposal. Checks of unsuccessful bidders will be returned immediately after the contract [fol. 28] is awarded, and of the succes-ful bidder upon the execution of the contract.

54. Form of Proposals.—Proposals and all exhibits, alternative plans, letters of explanation, circulars, and all other papers (except the certified check) which it is desired to have considered in connection therewith must be made in duplicate. Bidders are expected to read the specification with special care and to observe all of its requirements. Except in so far as proposals shall, under a special heading for the purpose, call attention to every particular wherein same conflicts with the requirements of the specifications, the latter shall govern and be complied with to the satisfaction of the Chief of the Bureau of Yards and Docks at the expense of the contractor. Proposals shall be made in ink or typewriting, without erasures, upon the prescribed blanks furnished bidders, as follows:

Item 1. Net price and time of completion for the work complete in accordance with this specification and the accompanying drawings.

Item 2. Net price and time of completion for the work complete as contemplated in item 1, conforming to the intent of this specification, but with such modifications of detail as are clearly defined and described in the proposal under a special heading entitled "Exceptions."

Item 3. Net price and time of completion for the work shown and specified to be installed in foundry building.

Item 4. Net price and time of completion for the work shown and specified to be installed in machine shop.

55. Evaluation of Bids.—Paragraph 10 of the "General provisions" relative to the "Evaluation of bids" is hereby cancelled.

[fol. 29] 56. Bidders shall submit information as follows with their proposals. (Each piece must be plainly stamped with the name of the bidder, or otherwise marked to indicate the bid to which it belongs.) Trade name and name of manufacturer of motors, blowers, heater units, radiators, all valves, gauges, thermometers, gaskets, and all accessories. Should a bidder fail to name the articles mentioned, the Government reserves the right to name the articles to be furnished subject to specification requirements.

57. Acceptance and Rejection of Proposals.—The Government reserves the right to award the contract upon any of the above items, to accept any bid, to waive any defects and informalities in the proposals, and to reject any or all bids.

58. Bidder's Ability.—Before he is awarded the contract, any bidder may be required to show that he has the necessary capital, facilities, experience, and ability to begin the work promptly and perform it in a satisfactory manner, and that he is regularly engaged in the business of performing such work.

59. Papers for Contracts.—Upon receipt of notice of award of contract, the successful bidder shall forward to the Bureau of Yards and Docks four additional exact copies of all papers accompanying the proposal except the certified check.

60. Examination of Site.—Intending bidders are expected to examine the site of the proposed work and inform themselves thoroughly of the actual conditions and requirements before submitting proposals.

61. Proprietary Articles.—Where proprietary articles are mentioned herein, bidders may base their proposals upon similar articles of equal value and efficiency, but the fact that they have done so [fol. 30] must be stated therein, and in all cases when not so stated such articles may be installed only with the approval of the officer in charge.

62. Information.—For any further information needed by intending bidders, application should be made to the Chief of the

Bureau of Yards and Docks or to the Commandant, Navy Yard, Norfolk, Va.

Any discrepancies or omissions noted by intending bidders in plans or specifications should be promptly referred to the Chief of the Bureau of Yards and Docks, Navy Department, Washington, D. C., for correction or interpretation before the opening of the bids.

Navy Department, Bureau of Yards and Docks, June 9, 1917.

[fol. 31] General Provisions Forming Part of Specifications for Contracts for Public Works, Bureau of Yards and Docks, Navy Department

March 20, 1917

1. Contract.—The contract to cover the work to be done will be base- upon these general provisions, the detailed specification of the work, and the plans or other papers to which such detailed specification refers, all of which will be attached to and form a part of the contract. The successful bidder will be the party of the first part to the contract and will be known as the contractor, and the Navy Department will be the party of the second part and known as the Government.

2. Government Representatives.—The work will be under the general direction of the Chief of the Bureau of Yards and Docks, acting under instructions of the Secretary of the Navy. A resident officer of the Corps of Civil Engineers, United States Navy, or other officer or representative of the Government, known as the officer in charge, will have immediate charge and supervision of the work and of all details thereof, including inspection. Appeals may be made to the resident senior naval officer, to the Chief of the Bureau of Yards and Docks, and to the Secretary of the Navy, in the order named.

3. Control of Work.—The Government, by its officer in charge, shall at all times exercise full supervision and general direction of all work under the contract so far as it affects the interests of the Government, and all questions, disputes, or differences as to any part or detail thereof shall be decided by such officer in charge, sub-
[fol. 32] ject to appeal, provided that it shall be distinctly understood that the supervision and general direction of all work under the contract by the officer in charge shall not relieve the contractor of responsibility for the full protection of and responsibility for his work, both as regards sufficiency and time of execution.

4. Omissions and Misdescriptions.—The omission from the contract or from the plans, specifications or other papers attached thereto and forming a part thereof or the misdescription of any details of work the proper performance of which is evidently necessary to carry out fully the geneal intention expressed in the detailed specification of the work shall not operate to release the contractor from performing such work, but the same shall be fully and properly per-

formed in the same manner as if fully and correctly indicated, described, and required in and by the contract and without expense to the Government in addition to the contract price.

5. Discrepancies.—The specifications and plans forming part of the contract shall be considered as supplementary one to the other, so that materials and workmanship indicated, called for, or necessarily implied by the one and not by the other shall be supplied and worked into place the same as though specifically called for by both. Should any discrepancy be found to exist between plans and specifications or any parts of either or should the language of any part of the contract prove to be ambiguous or doubt, the officer in charge will decide as to the true intent and meaning.

6. Facilities.—Unless otherwise specifically stated, the contractor shall be allowed reasonable space at the site of the work and access to the same for receiving, handling, storing, and working material. Employees, material, and plant shall be confined to the space assigned. Upon the completion of the work the contractor shall remove all his surplus material, machinery, tools, etc., from the property of the Government, and upon failure so to do within 30 days [fol. 33] from date of notice to remove they may be treated as abandoned property.

7. Employees.—The contractor shall employ only competent, careful, orderly persons upon the work; and if at any time it shall appear to the officer in charge that any person employed upon the work is incompetent, careless, reckless, or disorderly, or disobeys or evades orders or instructions or shirks his duty, such person shall be immediately discharged from and not again employed upon the work. Such discharge may be directed by the officer in charge, and if not acceptable to the contractor shall be nevertheless immediately effected preceding any appeal. No person undergoing sentence of imprisonment at hard labor shall be employed on the work. The contractor shall, in the prosecution of the work, take such measures for the safety of life and limb as will meet and satisfy the requirements of the laws of the State where the work is being done.

8. Time of Commencement of Work.—The contractor shall commence work immediately after the delivery to him of a copy of the contract and continue without interruption unless otherwise directed by the Government.

9. Time of Completion.—Each bidder shall state the number of calendar days required to complete the work, counting from the date a copy of the signed contract is delivered to him.

10. Evaluation of Bids.—Bids will be evaluated on the basis of the agreed damages per day in each case where different times for completion are named by bidders, the shortest time being taken as standard, and other bids increased at the per diem rate to cover the increased time required. Bidders are at liberty to submit as many bids as they desire, naming different periods of time for completion of the work.

11. Continuance of Work After Time.—It is mutually understood and agreed that in the event of the work not being completed [fol. 34] within the time allowed by the contract, said work shall continue and be carried on according to all the provisions of said contract, unless otherwise directed by the Government, in writing, and said contract shall be and remain in full force and effect during the continuance and until the completion of said work, unless sooner revoked or annulled according to its terms. Provided, That neither an extension of the time beyond the date fixed for the completion of said work nor the permitting or accepting of any part of the work after said date shall be deemed to be a waiver by the Government of its rights to annul or terminate said contract for abandonment or failure to complete within the time specified or to impose and deduct damages as hereinafter provided.

12. Extension of Time.—For causes of the character hereinafter enumerated extensions of time for the completion of the work may be allowed. Should the contractor at any time consider that he is entitled to an extension of time for any cause, he must submit in writing to the officer in charge an application for such extension, stating therein the cause or causes of the alleged delay. The officer in charge will refer the same at once, with full report and recommendations to the Navy Department, Bureau of Yards and Docks, for consideration and for such action as the circumstances may warrant. The failure or neglect of the contractor to submit, as above provided, his claim for extension of time within 30 days after the happening of the cause or causes upon which his claim is predicated, shall be deemed and construed as a waiver of all claims and right to an extension of time for the completion of the work on account of the alleged delay, and the contractor agrees to accept the finding and action of the Navy Department, Bureau of Yards and Docks, in the premises as conclusive and binding.

13. Damages for Delay.—In case the work is not completed within [fol. 35] the time specified in the contract, or within such extension of the contract time as may be allowed, it is distinctly understood and agreed that deductions at the rate named in the specifications of the work shall be made as liquidated damages and not as penalty from the contract price for each and every calendar day after and exclusive of the date within which the completion was required up to and including the date of completion, said sum being specifically agreed upon as a measure of damage to the Government by reason of delay in the completion of the work; and the contractor agrees and consents that the contract price, reduced by the aggregate damages so deducted, shall be accepted in full satisfaction for all work done under the contract.

14. Unavoidable Delays.—Unavoidable delays are such as result from causes which are beyond the control of the contractor, such as acts of Providence, fortuitous events, inevitable accidents, abnormal conditions of weather or tides or strikes of such scope and character as to interfere materially with the progress of the work. Delays caused by acts of the Government will be regarded as unavoidable

delays. Delays in securing delivery of materials, or by rejection of materials on inspection, or by changes in market conditions, or by necessary time taken in submitting, checking, and correcting drawings, or inspecting material, or by similar causes, will not be regarded as unavoidable. Should any delay in the progress of the work seem likely to occur at any time, the contractor shall notify the officer in charge in writing of the anticipated or actual delay, in order that a suitable record of the same may be made. (See par. 12.)

15. Progress.—The contractor, if so directed, shall furnish on a prescribed form a schedule of expected progress on the work under the contract, showing approximately the dates on which each part or division of the work is expected to be begun or finished. The [fol. 36] contractor shall also forward to the officer in charge as soon as practicable after the first day of each month a summary report of the progress of the various parts of the work under contract in the mills or shops and in the field, stating the existing status, rate of progress, estimated time of completion, cause of delay, if any, etc.

16. Annulment of Contract.—If at any time the progress of the work shall have been such as to show that the work cannot be completed within the time allowed, or should any provision of the contract be violated by the contractor the Chief of the Bureau of Yards and Docks may, if in his opinion the interests of the Government demand it, declare the contract null and void without prejudice to the right of the Government to recover for default therein or violations thereof. Should the contract be declared null and void, the contractor agrees that the Government may hold all material delivered and work done under the contract, and all machinery, tools, appliances, and accessories upon the site of the work or used in connection therewith pending the completion of the work covered by the contract unless allowed or directed to remove them in whole or in part. If the contractor is directed to remove the whole or any part of said machinery, tools, appliances, and accessories and fails or neglects to do so within 30 days after notice, the Government shall thenceforth be free from any responsibility for the care or preservation thereof and shall be entitled to reimbursement for any expense incurred in connection therewith. Upon the annulment of the contract a board of officers, or other representatives of the Government, shall be appointed, which shall ascertain and determine the value of all material delivered and work done, including a fair and reasonable margin of profit thereon, and upon the approval of the findings of said board by the Chief of the Bureau [fol 37] of Yards and Docks, the Government may proceed to complete the work according to the contract, with such changes as may subsequently be found necessary or desirable, in such manner and by such means as it may deem advisable, and may, if the interests of the Government demand it, use or employ any materials, tools, machinery, appliances and accessories belonging to or furnished by the contractor for use in connection with the work covered by the contract. Said board shall also inventory and estimate the value of said materials, tools, machinery, appliances, and accessories, and said inventory and esti-

mate shall, if approved by the Chief of the Bureau of Yards and Docks, be conclusive in any accounting between the parties of the contract: Provided, That the Government shall not be liable for depreciation by ordinary wear and tear, or injury or destruction by superior force, or for such material or articles as are consumed in use. Upon the completion of the work the cost of completing the same shall be ascertained and determined and when approved by the Chief of the Bureau of Yards and Docks, shall be final, conclusive, and binding upon all parties; and should the total cost of the work, including payments made by the contractor, exceed the contract price, modified by the cost of any changes made before or after annulment, determined as provided in the following paragraph, the difference shall be charged to the contractor, who undertakes and promises to pay the same upon demand. Should the total cost of the work be less than the contract price, the contractor shall be credited with the difference between the contract price, as modified by changes, and the total cost of the work, provided the amount so credited shall not exceed the amount found by the board above mentioned to be the value of the material delivered and work done by the contractor, less previous payments to him.

[fol. 38] 17. Changes.—The Government reserves the right to make such changes in the contract, plans, and specifications as may be deemed necessary or advisable, and the contractor agrees to proceed with such changes as directed in writing by the Chief of the Bureau of Yards and Docks. The cost of said changes shall be estimated by the officer in charge, and, if less than $500, shall be ascertained by him. If the cost of said changes is $500 or more, as estimated by the officer in charge, the same shall be ascertained by a board of not less than three officers or other representatives of the Government. The cost of the changes as ascertained above, when approved by the Chief of the Bureau of Yards and Docks, shall be added to or deducted from the contract price, and the contractor agrees and consents that the contract price thus increased or decreased shall be accepted in full satisfaction for all work done under the contract: Provided, That the increased cost shall be the estimated actual cost to the contractor at the time of such estimate and that the decreased cost shall be the actual or market value at the time the contract was made, both plus a profit of 10 per cent.

18. Extras.—The contract price shall cover all expenses, of whatever nature or description, connected with the work to be done under the contract. Should the contractor at any time consider that he is being required to furnish any material or labor not called for by the contract, a written itemized claim for compensation therefor must be submitted by him to the officer in charge, who will refer the same at once with full report and recommendation to the Navy Department, Bureau of Yards and Docks, for decision and formal order covering approved items, if any. The failure or neglect of the contractor to present as above his claim for material or labor alleged to be extra within 60 days after being required to furnish or perform the same shall be deemed and construed as a waiver

of all claim and right to additional compensation for the furnishing [fol. 39] or performance of the alleged extra material or labor, and the contractor agrees to accept the finding and action of the Navy Department, Bureau of Yards and Docks, in the premises as conclusive and binding.

19. Oral Modifications.—It is distinctly understood and agreed that no oral statements of any person whomsoever shall be allowed in any manner or degree to modify or otherwise affect the terms of the specifications, plans, or the contract. Changes shall be made only as herein elsewhere specified.

20. Patents.—The contractor shall forever protect and defend the Government in the full and free use and enjoyment of any and all necessary rights to any invention, machine, or device which may be applied as part of the work, either in its construction or use after completion, against the demands of all persons whomsoever.

21. Contractor's Responsibility.—The contractor shall be responsible for the entire work contemplated by the contract and every part thereof and for all tools, appliances, and property of every description used in connection therewith. All methods of work, tools, appliances, and auxiliaries of every description shall be safe and sufficient, and, if found by the officer in charge not to be so, shall be made satisfactory by the contractor without delay. The contractor shall specifically and distinctly assume all risks connected with the work, and shall be held liable for all damages or injury to property used or persons employed on or in connection with the work and all damage or injury to any person or property, wherever located, resulting from any action or operation under the contract or in connection with the work, and undertakes and promises to protect and defend the Government against all claims and to reimburse it for any outlay on account of any such damage or injury.

22. Supervision.—The contractor shall give the work his personal [fol. 40] attention and shall be present on the site of the work continually during its progress, either in person or by duly authorized representative, to receive directions or instructions from the officer in charge. The name of such authorized representative shall be communicated in writing to the officer in charge.

23. Eight-hour Law.—Special attention is called to the provisions of the laws relating to hours of labor upon public works. Any violation of said laws coming to the notice of the Government officers or employees will be reported to the Navy Department for such legal action as may appear warranted.

Subject to the provisions of section 2 of the eight-hour law of June 19, 1912, no laborer or mechanic doing any part of the work contemplated by the contract in the employ of the contractor or any subcontractor contracting for any part of said work contemplated shall be required or permitted to work more than eight hours in any calendar day upon such work. For each violation of this provision a penalty of $5 shall be imposed for each laborer

or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work, and the amount of any such penalties shall be withheld for the use and benefit of the Government from any moneys becoming due under this contract, whether the violation of this provision is by the contractor or any subcontractor.

24. Special Plans.—Wherever it shall be necessary, the contractor shall make special or detail plans in amplification of the contract plans, or in furtherance of the specifications, before proceeding with the execution of the work. Such plans shall be submitted to the officer in charge or Chief of Bureau of Yards and Docks, as may be directed, in the form of blue prints, in duplicate, for consideration, correction, or approval. When approved, one set of these prints [fol. 41] shall be returned to the contractor so marked. When changes or corrections are necessary, one set shall be returned to the contractor so noted, and he shall proceed as before with the submission of duplicate prints. When any plan has been approved, the contractor shall furnish the officer in charge with additional blue-print copies, or with the tracing, or an equivalent as regards the facility for printing. If a tracing is submitted, the Government will make such prints as it may require and will return the tracing to the contractor. On the completion of the work the contractor shall, if so directed, furnish the Government with one complete set of Vandyke prints, on cloth, of all approved plans. When the work of the contractor is of a nature originating with him, full general and detail plans shall be furnished to the Government in the form of tracings, or the equivalent as regards facility for printing, which shall, upon approval, become the property of the Government, approved sets or prints being furnished to the contractor. The approval of the general and detail plans of the contractor shall in all cases be of a general nature relating to their sufficiency and compliance with the intention of the contract, and shall not relieve the contractor from errors, discrepancies, or omissions therein contained, which shall be made good whenever found.

25. Checking Plans and Dimensions; Lines and Levels.—The contractor shall check all plans furnished him immediately upon their receipt and promptly notify the officer in charge of any discrepancies discovered therein. Figures marked on plans shall, in general, be followed in preference to scale measurements, but the contractor must compare all plans and verify the figures before laying out the work and will be held responsible for any errors therein that might have been avoided. Large-scale plans shall, in general, [fol. 42] govern small-scale plans. In all cases where dimensions are governed by conditions already established the contractor must depend entirely upon measurements taken by himself, scale or figured dimensions to the contrary notwithstanding, but no deviation from the specified dimensions will be allowed unless authorized by the officer in charge. The contractor shall be held responsible for the lines and levels of his work, which upon completion shall fulfill the intention of the contract.

26. Inspection.—The contractor must afford every facility necessary for the safe and convenient inspection of the work throughout its construction. The officer in charge shall have power to reject material and workmanship which are not in accordance with the contract, and all such must be removed promptly by the contractor and replaced to the satisfaction of the officer in charge without extra expense to the Government. Should it be deemed advisable by the officer in charge to make an examination of work already completed by removing or tearing out the same, the contractor shall furnish all necessary facilities, labor and material. If the work is found to be defective in any respect, due to the fault of the contractor, he shall defray all the expenses of such examination and of satisfactory reconstruction. If the work be found to meet the requirements of the contract, the actual cost of the examination plus 10 per cent will be allowed to the contractor, and the contractor shall be granted a suitable extension of time on account of the additional work involved, provided such extension of time is clearly warranted. Provisional acceptance in the course of construction shall not preclude rejection upon the discovery of defects previous to acceptance of the completed work. All inspection of material and workmanship will be made, unless otherwise provided, after delivery at the site. When [fol. 43] material is to be inspected at the factory, the "Instructions relative to factory inspection of machinery and material, coming under the cognizance of the Bureau of Yards and Docks, Navy Department," will form a part of the contract. Material rejected at the place of manufacture or elsewhere shall not be delivered on the site of the work, and material rejected at the site of the work shall be at once distinctly isolated and, as soon as possible, removed from the Government reservation, and not returned thereto.

27. Order, Protection, and Completion of Work.—The contractor shall protect his materials and work from deterioration and damage during construction, and upon completion shall without delay remove his plant and all surplus material and rubbish from the site. The contractor will be required to carry on this work without interfering with the ordinary use of the streets or with the operations of other contractors or delaying or hindering any work done by the Government, whether upon the site or not. He shall make good any damage to property of the Government caused by his operations. It is understood and agreed that the parties to the contract will, so far as possible, labor to mutual advantage where their several works in the above-mentioned or in unforeseen instances touch upon or interfere with each other. Mutual concessions under the direction of the officer in charge shall be made to secure this end.

28. Schedule of Prices.—Before the first payment becomes due the contractor shall submit to the officer in charge an itemized schedule of prices on prescribed forms furnished by the officer in charge. The officer in charge will check such schedule and forward it to the Bureau of Yards and Docks with his recommendation and the schedule, after it has been approved by the bureau, will govern the [fol. 44] preparation of monthly estimates. Allowance for non-

perishable material delivered at the site of the work will be made only when it appears to the satisfaction of the officer in charge that such material will be worked into place within a reasonable time after date of delivery, and the officer in charge shall determine what period shall constitute a reasonable time after delivery. Allowance will be made for such temporary work as is of intrinsic value to the Government for the time being, such as cofferdam, sheet piling, cribwork, dikes, concrete forms, scaffolding, etc., when such work constructed in accordance with general plans submitted by the contractor is in place and completed and found by the officer in charge to be sufficient for the purpose for which it was constructed: Provided, however, That allowance in any payment on account of such temporary work shall not be disproportionate to the value of other work included therein, to be determined by the officer in charge, and that payment shall place no responsibility on the Government for the success or failure of the structure on account of which payment is allowed. The prices to be allowed for material for use in temporary work shall be the estimated actual value to the Government should the contractor fail to proceed with the contract to completion. The prices for material used in the permanent structure shall be the actual current market value as nearly as may be ascertainable. The difference between the total of the schedule of prices prepared as above indicated and the contract price shall be distributed among all the items of the schedule so that the total of the approved schedule shall in every case equal the total contract price. When the contract or any part thereof is based on unit prices and estimated quantities, these quantities and unit prices shall be employed in the schedule. Whenever the contract price is increased or decreased by supple- [fol. 45] mentary agreement or order, the schedule of prices shall be amended to conform to the increased or decreased contract price.

29. Payments and Reservations.—Vouchers will be prepared by the officer in charge of the work as soon as practicable after the end of each month, covering his estimates, according to the schedule of prices, of all material delivered, material worked into place, and work done to date. From such gross estimate will be deducted the next previous gross estimate, if any, and 10 per cent of the difference unless otherwise specified. The contractor shall certify to the correctness, justness, and nonpayment of said vouchers, after which they will be forwarded to the Bureau of Yards and Docks for approval and for reference to the Paymaster General of the Navy for payment by check. Upon the completion of the contract the balance due on account thereof will be covered by similar vouchers, subject to any credits in favor of the Government: Provided, That the contractor shall first execute and deliver a final release to the Government, in such form and containing such provisions as shall be approved by the Navy Department, of claims against the Government arising under or by virtue of the contract.

30. Lien.—The Government shall have a lien upon the material entering into the work under the contract for all moneys paid for and on account thereof, which lien shall begin with the first payment,

and shall thereupon attach to the work done and materials furnished, and shall, in like manner, attach from time to time as the work progresses and as further payments are made, and shall continue until it shall have been properly discharged; and said lien hereby provided is, pursuant to the act of Congress approved August 22, 1911, paramount.

31. Subcontracts.—The contractor shall furnished to the officer in [fol. 46] charge, for the information of the Bureau of Yards and Docks, immediately upon the execution of any subcontract, a statement showing the name and address of the subcontractor, the character and location of the work involved, date of contract, time limit, if any, and amount of money agreed to be paid. This does not include material men performing no labor nor persons employed individually.

Navy Department, Bureau of Yards and Docks, March 20, 1917.

[fol. 47] Instructions Relative to Factory Inspection of Machinery and Material Coming under the Cognizance of the Bureau of Yards and Docks, Navy Department

These instructions will be followed when material is specified to conform to Navy Department Standard Specifications for "Electric Wires and Cables," "Induction Motors," "Direct Current Motors," "Transformers," "Structural Steel Work," or Standard Specifications of the American Water Works Association, or otherwise to have factory inspection.

Orders, Shipping Lists, etc.

1. Contractors shall ascertain from the Bureau of Yards and Docks whether inspection will be ordered by the Bureau or by the navy yard or station for which material is destined. Triplicate copies of the contractor's order shall be forwarded, as soon as issued, to the Bureau or to the navy yard or station which will have direction of the inspection. On contracts where an Inspector of Engineering Material is assigned to make shop inspection, quadruplicate copies of orders shall be sent direct to him in lieu of sending triplicate copies to Bureau, yard, or station. If orders provide for material apparently not in accordance with the contract the contractor will be so notified. Duplicate copies of assembly and detail drawings shall be forwarded to the Bureau or to the navy yard or station (as [fol. 48] may be directed) as soon as possible after the contract is placed. Any work done previous to the approval of drawings will be at the contractor's risk. The approval of all drawings is made subject to the contract requirements, and such approval will not waive any requirement of the specifications unless specific exception is taken in the contract. When drawings are approved the contractor will be notified, and should immediately forward such additional copies of the drawings as may be required.

2. Upon request from the inspector the manufacturer shall notify the inspector when the material or machinery will be ready for inspection. Failure to do this will delay inspection indefinitely. If incorrect information is given, thereby causing one or more useless trips by the inspector, the Government reserves the right to charge the expenses of such useless trips to the contractor.

3. The manufacturers shall show the inspector all schedules and orders of material for the Government placed with them by the contractors.

Office and Inspectors

4. Access to Work and Information.—The Department shall have the right to keep inspectors at the works, who shall have free access at all times to all necessary parts thereof and be permitted to examine the raw material and to witness the processes of manufacture. Contractors and manufacturers shall furnish all the information and facilities the inspectors may require for proper inspection under these specifications.

5. Inspector's Office and Furniture.—Each firm manufacturing material shall furnish the inspectors, free of expense, with such facili- [fol. 49] ties as may be necessary for the proper transaction of their business as agents of the Government.

Expense

6. Handling Material.—All handling of material necessary for purposes of inspection shall be done at the expense of the contractor.

7. Making Tests.—All test specimens necessary for the determination of the qualities of material used shall be prepared and tested at the expense of the contractor.

Acceptance and Rejection of Material

8. Acceptance and Shipment of Material—

(a) No material shall be shipped by manufacturer or subcontractor except by direction of the inspector, the Bureau of Yards and Docks, or the commandant of the navy yard or station concerned.

(b) The manufacturer shall furnish the inspector, immediately after each shipment of material, an invoice of shipment in quadruplicate, which must give—

(1) Identification marks.

(2) Dimensions of each object.

(3) Actual weight of each object or of each lot of similar objects of like dimensions. When material is ordered by weight or gauge, the estimated weights must also be given.

(4) Date of shipment.

(5) Names of consignor and consignee.

(6) Number and initials of car when shipment is made in carload lots.

(7) Number of pieces and packages shipped.

[fol. 50] (c) Any delay in furnishing this information will cause a like delay in the acceptance of the material at destination and in the preparation of vouchers incident to payments for same.

9. Rejection at Destination.—Material may be rejected at a navy yard or other place of delivery for surface or other defects either existing on arrival or developed in working or storage, even though such material may have previously passed inspection by the Government inspector at the place of manufacture or origin. In such cases the contractor must make good any material rejected.

Instructions for the Inspector

10. The navy yard, naval station, or Bureau will endeavor in all cases to forward to each inspector concerned, as soon as received from the contractor, the necessary specifications, drawings, and data to be used in connection with the work of inspection. Attention is invited to paragraph 16, which provides that suborders based upon the main order will be obtained by the inspector.

11. In some cases it is possible that the inspector will receive information regarding the manufacture of material or machinery before it comes to the attention of the Bureau. In such cases it is desired that the inspector immediately inform the Bureau of Yards and Docks, and data will be obtained and forwarded.

12. In making inspections, the Bureau desires that all of the tests specified, both in the printed specifications and in the letters requesting inspection, be conducted. If any condition arises making it impossible to conduct these tests, the approval of the Bureau should be obtained before omitting them. A record of the tests made and results obtained should be made and a complete copy forwarded to the Bureau and the commandant of the navy yard or station for [fol. 51] which the material is destined. When curves are advisable to show the performance characteristics, they should also be prepared and forwarded.

13. When the material or machinery conforms to the specification, the inspector will make immediate authorization of shipment.

14. If the material or machinery offered for inspection differs slightly from the specifications or is slightly defective, the inspector will use his judgment to determine whether the material should be accepted. The report to the Bureau, navy yard, or station originating the request should describe definitely the points at variance with the specification.

15. In instances where the material differs from the specifications to such an extent as to require reference to the Bureau, navy yard, or station originating the request for decision, it is requested that a definite report be made with the greatest expedition possible in order that the decision may be rendered without delay regarding the disposition to be made.

16. Where instructions have been issued to an inspector which require the inspection of part of the order at another point, the inspector will procure copies of that order for the portion and forward them to the proper inspection district as noted in the list at the end of these instructions. A copy of the order, together with the letter or indorsement requesting such inspection, shall be sent to the Bureau of Yards and Docks or to the navy yard or station as designated by the origin of the request for inspection.

17. Unless definitely specified, as in Standard Specification for Structural Steel Work, no chemical analyses, tensile or compressive tests, need be made on material for the Bureau of Yards and Docks.

18. When shipment is made, copies of the Shipping Report (Form [fol. 52] 101, Bureau of Steam Engineering) should be sent to the Bureau of Yards and Docks, and also to the officer having cognizance of the material at the point of delivery. The report shall bear the inspecting officer's certificate that the material conforms to all requirements. In the case of f. o. b. shipments, a copy of the report should be sent to the Bureau of Supplies and Accounts.

19. The following officers will make inspection of material coming under the cognizance of the Bureau of Yards and Docks:

Commandant, Naval Training Station, Great Lakes, North Chicago, Ill. Inspector of Machinery, Bayonne, N. J. (for boilers only). Naval Inspector of Engineering Material, Boston, Mass.; Brooklyn, N. Y.; Hartford, Conn.; Pittsburgh, Pa.; Philadelphia, Pa.; South Bethlehem, Pa.; Schenectady, N. Y.

Navy Department, Bureau of Yards and Docks, June 1, 1917.

[fol. 53] Bond

(This form to be used when the surety is a corporation)

Know all men by these presents, that we H. E. Crook Co., Inc., a corporation of the State of Maryland, having an office and place of business at No. 28 Light Street, Baltimore, Maryland, as principal, and the United States Fidelity and Guaranty Company, a corporation created under the laws of the State of Maryland, as surety, are held and firmly bound unto the United States of America in the just and full sum of Twenty-one thousand five hundred eighty-three and 50/100 dollars ($21,583.50), lawful money of the United States, to be paid to the United States; for which payment, well and truly

to be made, we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 14th day of August, A. D. 1917.

The condition of this obligation is such, That if the above-bounden principal, H. E. Crook, Inc., shall well and truly perform and fulfill its contract, dated August 14, 1917, entered into with the United States, for furnishing, delivering and installing two heating systems, one in the Foundry Building and one in the Machine Shop at the Navy Yard, Norfolk, Virginia, conforming in all respects to the stipulations, covenants, and conditions of said contract, as it now exists or may be modified according to its terms, and shall promptly make payments to all persons supplying them with labor and materials in the prosecution of the work provided for in the aforesaid [fol. 54] contract, then this obligation to be void and of no effect; otherwise to remain in full force and virtue.

H. E. Crook Co., Inc. Howard E. Crook, President. (Seal.) W. L. Handy, Sect. (Seal.) United States Fidelity and Guaranty Co., Surety, by R. Howard Blank, Vice President. Attest: Wm. M. Pegram, Asst. Secretary. (Seal.)

Signed, sealed and delivered in the presence of S. Gordon Hopkins, Frank H. Haines. (Seal.) Arthur P. Shanklin, Jr., Jno. C. Schlforst, as to surety.

Navy Department, Office of the Solicitor, August 21, 1917. Approved, Graham Egerton, Solicitor.

[fol. 55] II. General Traverse—Filed Nov. 16, 1922

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. History of Proceedings

On February 7, 1924, the case was argued and submitted on merits by Mr. Julian C. Hammack, for the plaintiff, and by Mr. E. C. Fletcher, for the defendant.

On March 3, 1924, the court filed findings of fact and conclusion of law dismissing the petition and entered judgment against the plaintiff in the sum of $11.91, for printing the record, with an opinion by Hay, J., from which Booth, J., dissented.

On March 17, 1924, the plaintiff filed a motion for a new trial.

On March 31, 1924, the court entered the following order:

"It is ordered by the court this 31st day of March, 1924, that the plaintiff's motion for a new trial be and the same is overruled.

Memorandum

The findings of fact in this case followed the stipulation made by the parties."

On April 8, 1924, the plaintiff filed a motion for leave to file a second motion for a new trial. Said motion for leave to file was submitted in open court.

IV. Order of Court Withdrawn, Findings and Opinion—Filed April 28, 1924

It is ordered by the court this 28th day of April, 1924, that the findings of fact and opinion heretofore filed in this cause be and the same are withdrawn. New findings of fact and conclusion of law dismissing petition are this day filed, with opinion by Judge Hay.

[fol. 56] **Findings of Fact, Conclusion of Law, and Opinion by Hay, J.**—Entered April 28, 1924

This case having been submitted to the court upon stipulation signed by the Assistant Attorney General, Robert H. Lovett, on behalf of the United States and by the plaintiff's attorney on behalf of the plaintiff, the court, upon said stipulation, makes the following

Findings of Fact

I

The plaintiff is a corporation of the State of Maryland, and has its home office at Baltimore, Maryland, and on August 14, 1917, the plaintiff entered into a contract in writing with the United States whereby it agreed to furnish all labor and materials necessary to install two heating systems, one in the foundry building, and one in the machine-shop building in the navy yard, Norfolk, Virginia, for which the plaintiff was to receive the sum of $71,945. The plaintiff under the terms of the contract agreed to complete the work within 200 calendar days from the date that a copy of said contract was delivered to it. A copy of said contract was delivered to the plaintiff on August 31, 1917, and the date of completion of the contract was accordingly March 19, 1918. A copy of the said contract is attached to the petition marked "Exhibit A," and is made a part hereof by reference.

II

The contract provided that the Navy Department should furnish outside hot-water flow and the return pipes in tunnel to building

lines. The Navy Department did not complete and furnish the piping to the building lines as it agreed to do until March 1, 1919, and plaintiff was not able to make required connections until after March 1, 1919, almost one year later than March 19, 1918, the date on which the plaintiff under the contract was to complete the work.

III

The foundry building and the machine-shop building were each being erected by the Navy Department and were not erected within [fol. 57] the time contemplated in the contract of the plaintiff. The defendant did not permit the plaintiff to begin installation in the foundry building until May 27, 1918, and in the machine-shop building until August 15, 1918, about four months after the date when the work was to have been completed. The Government having delayed the performance of the contract, through no fault of the plaintiff, extended the contract time 387 days.

IV

The Navy Department did not sufficiently erect the foundry building for the commencement of the work therein, and did not permit the plaintiff to begin to work therein until May 27, 1918. The defendant did not sufficiently erect the machine-shop building, nor permit the plaintiff to begin the installation therein until August 15, 1918; and did not complete and furnish the piping to the building line until March 1, 1919, and plaintiff could not make the connections and tests required until after March 1, 1919. During the prosecution of the work wages increased, and the plaintiff paid the sum of $6,439.86 in wages, which was in excess of the amount it would have had to pay if its work had been begun on August 31, 1917, the date agreed upon for the commencement of the work.

On May 29, 1919, the plaintiff paid to the United States Fidelity and Guaranty Company the sum of $719.45 as an additional premium for the execution and delivery to defendant of a removal bond covering contract No. 2466 and for the faithful performance thereof. Said premium accrued subsequent to the completion date of said contract March 19, 1919, and by reason of the extra time required in completing the installation of the heating system on April 10, 1919.

V

As a result of the aforesaid delays the plaintiff was not permitted to start its work until long after the time agreed upon for its completion and was compelled to perform all the work and to complete its contract at a time considerably later than agreed to by the terms of the contract, at which later time workmen's wages were increased and the plaintiff was compelled to and did pay $6,439.86 for such wages in excess of the amount it would have paid except for defendant's aforesaid delays.

The plaintiff completed the work required of it by said contract 2466 on December 8, 1919, and said work was accepted as satisfactory by the Navy Department, and the plaintiff was paid the contract price therefor, to wit, the sum of $71,945.

CONCLUSION OF LAW

Upon the foregoing findings of fact the court decides as a conclusion of law that the plaintiff is not entitled to recover and that its petition be, and the same is hereby, dismissed. Judgment is awarded against the plaintiff for the cost of printing the record in this cause, which the clerk, after ascertaining the amount thereof, will collect according to law.

[fol. 58] OPINION

HAY, Judge, delivered the opinion of the court:

This is a suit brought by the plaintiff against the United States for the sum of $7,159.31, made up of two items, one of which is the sum of $6,439.86, being the amount paid by the plaintiff for wages which it alleges was in excess of what it would have paid had not the Government delayed it in the completion of the work contracted for, and the other is the sum of $719.45 additional premium paid on the bond required by the contract and which it would not have been compelled to pay had not the Government delayed it in the completion of its contract.

The plaintiff entered into a contract with the United States whereby it agreed to furnish the labor and materials for the installation of two heating systems in certain buildings at the navy yard, Norfolk, Va. The plaintiff agreed to complete the work within 200 calendar days from the date that a copy of the contract was delivered to it. The contract was delivered to it on August 31, 1917, and accordingly the date of completion was March 19, 1918.

The buildings in which the heating systems were to be installed were being erected by the Navy Department. They were not ready for the installation of the heating systems on August 31, 1917, and owing to the delay of the Government the plaintiff was not able to begin work on its contract until May 27, 1918, which date was more than two months after the date fixed for the completion of the work.

The facts found in this case are taken from the stipulations of the parties as to what the facts are. No evidence appears in the record, and the court is therefore compelled, in arriving at its decision, to rely upon the facts as agreed to by the parties.

What contract work had been done, if any, before the date for the completion of the contract does not appear. What quantities of necessary materials had been purchased and delivered at the site and when they were purchased and delivered does not appear. What negotiations were entered into between the parties, when it was found that the work could not be begun on the date fixed in the contract, does not appear. What, if any, demand was made on the

defendant for additional compensation by reason of the increase of wages, or when such a demand was made, if any, does not appear.

We draw no inference from the failure of the parties to include these relevant facts in the stipulations, except that without them the plaintiff must be held to have elected to go on with the work under the terms of the contract.

The plaintiff on May 15, 1918, began work under the contract, and continued its work under the contract until its completion, when the work was accepted and the plaintiff was paid in full the contract price for the work on December 8, 1919. At the same time it reserved the right to sue for the items now claimed by it. It appears that the plaintiff, notwithstanding the breach of the contract on the part of the Government, went on with the work under the terms of the contract without making any demand upon the defendant either as to increase of wages or as to the additional premium on the bond. The plaintiff by its conduct waived the breach and the parties were in precisely the same position which they occupied when the contract was entered into, the plaintiff still agreeing to perform [fol. 59] the work for the contract price of $71,945, which sum under the contract was to cover all expenses connected with the work.

The plantiff had the right, if it had chosen to exercise it, to refuse to go on with the work, but when it elected to proceed with the work and took no steps to protect itself against any extra expense which it might incur by reason of the delay of the Government, and proceeded with the work under the contract, the parties stood in the same relation to each other as they did when the contract was entered into. The fact that wages increased during the progress of the work, or after the work was begun by the plaintiff under the contract, although the date of the commencement of the work had been postponed by the Government, does not give the plaintiff the right to add to the price of the work any more than would the United States have the right to deduct from the contract price any decrease in wages which might have taken place during the progress of the work.

The fact that wages had increased must have been within the knowledge of the plaintiff when it elected to go on with the work under the contract. It then made no demand nor any endeavor to get the contract price of the work changed to meet altered conditions. Having waived the breach, it can not now be heard to ask for a change in the contract which will impose upon one of the parties the payment of an additional sum for the completion of the work.

The same reasoning applies to the other item of the claim.

The petition must be dismissed. It is so ordered.

Downey, Judge; Booth, Judge; and Campbell, Chief Justice, concur.

[fol. 60] VI. Judgment of the Court

At a Court of Claims held in the City of Washington on the Twenty-eighth day of April, A. D., 1924, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find- in favor of the defendant, and do- order, adjudge and decree that the plaintiff, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition be and the same hereby is dismissed: And it is further ordered and adjudged that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of eleven dollars and ninety-four cents ($11.94) for printing the record in this court, to be collected by the Clerk, as provided by law.

By the Court.

VII. Plaintiff's Application for Appeal

Now comes the plaintiff, H. E. Crook Company, Inc., by its attorney of record, Bynum E. Hinton, on this 19th day of June, 1924, and makes application for and gives notice of appeal to the Supreme Court of the United States from the judgment rendered in the above entitled cause on April 28, 1924.

Bynum E. Hinton, Attorney for Plaintiff.

VIII. Order of Court Allowing Plaintiff's Application for Appeal

On this 23d day of June, 1924, it is ordered by the Court that the plaintiff's application for appeal be and the same is allowed.

[fol. 61] In Court of Claims

[Title omitted]

Clerk's Certificate

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law and opinion of the Court by Hay, J., of the judgment of the court; of the plaintiff's application for appeal and of the order of the court allowing said application.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Twenty-sixth day of June, A. D., 1924.

F. C. Kleinschmidt, Assistant Clerk Court of Claims. (Seal of Court of Claims.)

Endorsed on cover: File No. 30,463. Court of Claims. Term No. 498. H. E. Crook Company, Inc., appellant, vs. The United States. Filed July 2nd, 1924. File No. 30,463.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 122.

H. E. CROOK COMPANY, INC., *Appellant*,

v.

THE UNITED STATES.

BYNUM E. HINTON,
Attorney for Appellant.

Of Counsel:
JULIAN C. HAMMACK.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

DECISIONS.

The principle of law involved in this case has been established by many decisions, including those of this Court and the Supreme Court of the United States—namely, that the government is liable for damages suffered by delays which it has caused.

Stubbins vs. Exposition Co., 110 Ill. App. 210.
Nelson vs. Pickwick Co., 30 Ill. App. 333, 335.
Del Genovese vs. Third R. R. Co., 13 N. Y. App. 412, 422, 424.
Muller vs. The United States, 113 U. S. 153.
Kelly & Kelly vs. The United States, 31 Ct. Clms. 361.
William Cramp & Sons vs. The United States, 41 Ct. Clms. 164, 193.
Jarrett Chambers Co. vs. U. S., 57 Ct. Clms. 615.
John W. Danforth Co. vs. The United States, 57 Ct. Clms. 622.
United States vs. Smith, 256 U. S. 11, 65 Law Ed. 808.
Freund vs. U.S., 260 U.S. 60, 69.

There being no question as to the facts in the case, and the decisions being very clear as to the right of the plaintiff to recover, judgment in the full amount actually expended by the plaintiff is requested.

Respectfully submitted,

BYNUM E. HINTON.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 122.

H. E. CROOK COMPANY, INC., *Appellant*,

v.

THE UNITED STATES.

STATEMENT OF THE CASE.

This appeal is from a judgment of the Court of Claims dismissing the plaintiff's petition. The suit was for damages which plaintiff had suffered due to breach of contract by the Government. The court below found as a fact that the delay of the Government in furnishing certain buildings was a breach of the contract and resulted in an increased cost to the plaintiff by reason thereof in the sum of $7,159.31 (R. p. 34, Findings IV and V). Plaintiff was not allowed to recover, however, as the court held as a conclusion of law that by proceeding with the performance of the work after the breach, it waived the breach.

The Court of Claims has allowed recoveries in numerous prior cases on authority of decisions of this court, in instances where a contractor has incurred increased cost due to delays caused by the Government. In fact, this same plaintiff was allowed such recovery on another contract,

suit for which was filed simultaneously with the suit covering the contract involved in this case. These two cases of plaintiff were argued together and judgment was rendered on the same date. (R. p. 32). See also *Crook v. U. S.*, 59 Ct. Cl. 348.

The distinction made by the court between the case at bar and the other cases in which recoveries were allowed was that by starting the work after the time provided for the completion of the contract, although the delays were admittedly due to the Government, the contractor in law waived the damages caused thereby. The facts in the instant case were that plaintiff's contract required completion by it on March 19, 1918; that due to the delays of the Government in furnishing the buildings in which plaintiff's work was to be performed, plaintiff was not permitted to begin work until May 27, 1918, or about two months after the date fixed for the completion of the work. (R. p. 34, Finding IV, 35.)

The plaintiff was required to and did expend, by reason of the aforesaid delays, $6,439.86 additional for wages and $719.45 additional for bond premium; or a total of $7,159.31 in excess of the amount plaintiff would have expended for said items except for the aforesaid delays. (R. p. 34, Findings IV and V.) Notwithstanding such facts, the court below refused judgment. In this connection, the court said (R. p. 36):

> "The plaintiff had the right, if it had chosen to exercise it, to refuse to go on with the work, but when it elected to proceed with the work and took no steps to protect itself against any extra expense which it might incur by reason of the delay of the Government, and proceeded with the work under the contract, the parties stood in the same relation to each other as they did when the contract was entered into."

The court does not find any facts indicating that the plaintiff released the Government from liability for the items in suit; nor do the findings indicate any new contract

or agreement between the parties at the time work was begun on May 27, 1918. There were no such facts present in the dealings between these parties. The mere proceeding with the work was impliedly held as a waiver by the plaintiff of the otherwise collectible damages for the Government's breach.

The sole question on this appeal is, therefore, whether the admitted breach has, in law, been waived by the plaintiff.

AUTHORITIES.

The opinion of the court below does not refer to any authorities justifying the conclusion that proceeding with the work amounted, in law, to a waiver. An examination of authorities on the subject shows that the law is directly contrary to the holding of the court below.

GOVERNMENT'S BREACH NOT WAIVED BY CONTRACTOR PROCEEDING WITH THE WORK.

In *Stubbins Co. v. World's Columbian Exposition Co.*, 110 Ill. App. 210, the contractor was delayed in that none of the buildings were ready for his work so that the same might be completed within the time specified, and wages advanced so that the cost of the work was thereby increased. In considering the allowance of the company's claim for damages, in spite of the fact that the work was later prosecuted and completed, the court at page 220 said:

> "The propriety of an allowance for claims for damages for such delay when supported by the evidence, has been recognized * * * and the contractor was not obliged to abandon the work and sue for damages but had a right to proceed to complete it and then claim damages."

In *Tobey v. Price*, 75 Ill. 645, plaintiff had contracted to furnish defendant with brick work on a building. This could not be done until certain stone and iron work which

was to be done by the defendant had been completed. The defendant delayed in doing this to the plaintiff's damage, who completed the work and brought suit for the damages occasioned by the delay. The defense was urged that the plaintiff should have abandoned the work, but, electing to complete, could claim no more than the contract price. The court, however, held (page 647):

> "We know of no authority for such a position. Appellees could have abandoned the work and brought their action for damages, but their right to proceed with the work to completion and then claim damages cannot be seriously questioned."

In *Garfield etc. Co. v. Fitchburg R. R.*, 166 Mass. 119, certain delays of the defendant in discharging vessels within a reasonable time were the subject of a claim for damages, and the court, speaking through Mr. Justice Holmes (page 122) said:

> "It is suggested that the plaintiff waived its rights by allowing its vessels to be discharged at a later time. No doubt cases occur in which parties going on with the contract after the time stipulated for performance show by their acts that they have modified the contract and enlarged the time.
>
> *"But a contractor, by taking what he can get under his contract, when he can get it, no more necessarily and as a matter of law waives a claim for damages for failure to perform on time than he necessarily waives a defect of quality by accepting goods."* (Italics ours.)

Again, this same question was before the court in *Starbird v. Barrons*, 38 N. Y. 230. The lower court having held that the performance after breach was a waiver of the damage, the plaintiff appealed, and the appellate court (page 237) said:

> "Beyond all doubt the plaintiff was at liberty, on the failure of the defendants to perform the engage-

ment on which he depended, to rescind the contract, and claim at least such damages as are indicated in the opinion of the court; but whether, under such a state of things, that would be the entire measure of damages may well be questioned. But, I do not understand that a party is not at liberty, if he thinks he sees a fair prospect, or, indeed, but a reasonable hope that he may still perform, notwithstanding the default of the other party,—to go on and complete his engagement and earn the compensation to which in that event he will be entitled; and if he ultimately fails to accomplish the result, that he cannot claim all the damages and repair the losses he has suffered by the defaults of the other party. While a party thus situated is at liberty to rescind a contract, he is not obliged to do this, when it is not probable that a rescission will afford him a remedy adequate to the damages he has sustained."

This same question of whether a breach of the contract was waived by performance was also before the court in *El Paso & Southwestern R. R. Co. v. Eichel & Weikel,* 130 S. W. 922, the court stating, at page 940:

> "When the obligation of performance by one party presupposes the doing of some act by the other party thereto, the neglect or refusal to perform such act not only dispenses with the obligation of performance by the other, but also entitles him to rescind, or, *when rescission will not afford him an adequate remedy, to continue the work and recover such damages as the delinquency has occasioned.*" (Italics ours.)

A rather recent case, with facts on all fours with the facts in the instant case, is found in the decision in *Belmar Contracting Co. v. State of New York,* 194 App. Div. (N. Y.) 69. The contractor in this case had entered into a contract to perform certain road work for the Highway Commission of the state. The commission delayed the contractor in starting the work, and when the Commission finally allowed the contractor to proceed, it was considered too late in the season and the contractor waited until the spring of

the following year and then started and completed the contract and sued in the Court of Claims of the state for the increased cost by reason of the aforesaid delays.

The Court of Claims, as in the case at bar, found that the delays had been incurred by the defendant, and that the plaintiff had suffered some $10,716.05 increase in costs by reason of these delays. The Court of Claims dismissed the petition on the theory of waiver and the plaintiff appealed. On appeal, the only question before the court was whether the claimant had in any way waived or released a right of action to recover the damages for delays.

The Court at page 76, said:

> "It is true that claimant, by commencing a performance in the spring of 1916, waived the breach of contract committed by the State in the fall of 1915 *to the extent* that the breach would have justified its own abandonment of the contract and a suit for lost profits to be gained from timely performance. *It did not, however, waive the breach in the sense that it could no longer sue to recover damages thereby.* It is settled law that a contractor who is delayed in commencing work may nevertheless undertake it; that he may complete within a period determined by the contract plus the time of delay; that he may then sue for damages occasioned by the original delay. * * * *Any argument made to the contrary is based upon a failure to note that, although conditions may be waived, promises must either be satisfied by performance or extinguished by payment or a seal importing payment.*" (Italics ours.)

It is interesting to note in *Belmar Contracting Co., supra* that the evidence showed that in a certain conversation between the president of the company and the engineer of the Highway Commission, the president stated his notice to begin work had come too late to start the work at that time of the year. The engineer apparently coincided with the company's president in concluding it would be better to wait until spring. The situation was left just that way. The defense was made that such circumstances and conduct

were tantamount to a new agreement for work at the later time and was, in law, a waiver of any liability for the delays. The court, however, commenting on this phase of the matter, at page 77 said:

> "In the conversation between the president of the claimant and the division engineer no new promises were entered into, no new consideration was given or promised and no alteration of the existing contract was made. The claimant was not released thereby from any obligation to construct the highway. Having already been released, therefore, by operation of law, accordingly as it might elect, it did not then enter into any new engagement for its future construction. On the other hand, the division engineer did not extend the claimant's time for performance otherwise than it had already been extended by operation of the law. *There was, therefore, no new contract made which modified the old.* Consequently the previously broken obligation of the State not to delay claimant was upon that occasion neither released nor satisfied, and the cause of action which had accrued to claimant continued to be enforceable." (Italics ours.)

The judgment of the Court of Claims was reversed and found in favor of the plaintiff for the amount of excess cost incurred by the plaintiff by reason of the defendant's delays.

In the case at bar, the findings do not indicate any conversation or correspondence or agreement of any kind whatsoever indicating that the plaintiff agreed to release the defendant from these damages incurred by reason of its breach. There never was any such agreement, and the court below is clearly in error in concluding that merely by proceeding with the work after the breach, the plaintiff by such conduct waived its right to these damages.

Again in Beskin vs. State, 195 N. Y. S. 951, the Court of Claims of the State awarded damages for breach of contract giving claimant the increase cost of labor and materials caused by the State's delay, regardless of claimant's

performance after the breach, without notice of its intention to claim damages. The Court said in this connection (p. 953):

> "Where the failure of a contractor to complete the work by the time set is due to a default of the owner, the contractor may, *without notice,* complete the work and recover the additional expense made necessary by the delay." (Italics ours.)

Accordingly, therefore, the appellant herein is entitled to receive the sum of $7,159.31, as found by the court below to be the sum which appellant was caused to expend in excess of the amount that it would have otherwise expended for said items except for the defendant's delays.

Respectfully submitted,

BYNUM E. HINTON,
Attorney for Appellant.

Of Counsel:
JULIAN C. HAMMACK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

H. E. CROOK COMPANY, INC., *Appellant*,
vs.
UNITED STATES

No. 122

BYNUM E. HINTON,
GEORGE M. BRADY,
Attorneys for Appellant.

PETITION FOR REHEARING.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUPREME COURT OF THE UNITED STATES.

No. 122.—October Term, 1925.

H. E. Crook Company, Inc., Appellant, vs. The United States. } Appeal from the Court of Claims.

[January 25, 1926.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims, taken under § 242 of the Judicial Code before that section was repealed by the Act of February 13, 1925, c. 229, § 13; 43 Stat. 936, 941. The claim is for damages due to delay in enabling the plaintiff to perform a contract. The Court of Claims held that the plaintiff waived any claim that it might have had by going on with the work without protest and without taking any steps to protect itself. 59 C. Cl. 593. The Government contends that by the terms of the contract it was not bound to pay damages for delay.

The contract was that the plaintiff should furnish and install heating systems 'one in the Foundry Building, and one in the Machine Shop at the Navy Yard, Norfolk, Virginia.' It allowed two hundred days from the date of delivering a copy to the plaintiff for the work to be completed. A copy was delivered on August 31, 1917, making March 19, 1918, the day for completion. But it was obvious on the face of the contract that this date was provisional. The Government reserved the right to make changes and to interrupt the stipulated continuity of the work. *Wells Brothers Co.* v. *United States,* 254 U. S. 83, 86. The contract showed that the specific buildings referred to were in process of construction by contractors who might not keep up to time. 'The approximate contract date of completion for the foundry' is stated to be March 17, 1918, and that for the machine shop, February 15, 1918. The same dates were fixed for completing the heating systems, but the heating apparatus had to conform to the structure, of course, so that if the general contractors were behindhand the heating

also would be delayed. They were behindhand nearly a year. When such a situation was displayed by the contract it was not to be expected that the Government should bind itself to a fixed time for the work to come to an end, and there is not a word in the instrument by which it did so, unless an undertaking contrary to what seems to us the implication is implied.

The Government did fix the time very strictly for the contractor. It is contemplated that the contractor may be unknown, and he must satisfy the Government of his having the capital, experience, and ability to do the work. Much care is taken therefore to keep him up to the mark. Liquidated damages are fixed for his delays. But the only reference to delays on the Government side is in the agreement that if caused by its acts they will be regarded as unavoidable, which though probably inserted primarily for the contractor's benefit as a ground for extension of time, is not without a bearing on what the contract bound the Government to do. Delays by the building contractors were unavoidable from the point of view of both parties to the contract in suit. The plaintiff agreed to accept in full satisfaction for all work done under the contract the contract price, reduced by damages deducted for his delays and increased or reduced by the price of changes, as fixed by the Chief of the Bureau of Yards and Works. Nothing more is allowed for changes, as to which the Government is master. It would be strange if it were bound for more in respect of matters presumably beyond its control. The contract price, it is said in another clause, shall cover all expenses of every nature connected with the work to be done. Liability was excluded expressly for utilities that the Government promised to supply. We are of opinion that the failure to exclude the present claim was due to the fact that the whole frame of the contract was understood to shut it out, although in some cases the Government's lawyers have been more careful. *Wood* v. *United States*, 258 U. S. 120. The plaintiff's time was extended and it was paid the full contract price. In our opinion it is entitled to nothing more.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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In The

Supreme Court of the United States

October Term, 1925

H. E. Crook Company, Inc., *Appellant*,

vs.

United States

No. 122

PETITION FOR REHEARING.

Now comes H. E. Crook Company, Inc., Appellant, and respectfully prays the Court for a rehearing in this cause.

This rehearing is requested not only because of a firm conviction that the construction placed by the Court on the contract in suit is erroneous and does injustice to appellant, but because the decision fails to distinguish a long line of American decisions, both federal and state, as well as English decisions, giving a contrary interpretation to similar building contracts involving every element here present, and thus leaves the law of building contracts in uncertainty and confusion. In fact, it is believed impossible to distinguish this case in principle from an unbroken line of English

and American decisions running back nearly a century, and if this decision stands those authorities are at an end in our courts.

For the reasons stated, and particularly because of the far-reaching importance of the question involved, we earnestly request that a reargument be granted. In support hereof a brief of the authorities is attached.

Respectfully submitted,

BYNUM E. HINTON,
GEORGE M. BRADY,
Attorneys for Appellant.

BRIEF IN SUPPORT OF PETITION.

THE ISSUE AND THE DECISION

The contract, prepared by the government, obligated appellant with great strictness and under penalty to perform within a definite time. It was not permitted by the government to perform this obligation as required and was delayed more than a year. The suit is for the damages thereby occasioned. Appellant claims that the obligation which it was required to assume imposed on the government the corresponding duty of doing whatever was necessary on its part to enable appellant to comply with its contract. The decision concedes there was no express provision in the contract exempting the government from liability for such a claim, but holds that the whole frame of the contract was understood to shut it out.

ARGUMENT

The question presented, therefore, is whether the terms of this contract imposed upon the government the obligation to give appellant access to the site and afford it a fair and reasonable opportunity to perform within the stipulated time; or whether, as observed by an English justice, on a similar contract, Bush vs. Trustees of Whitehaven (infra), its language is such as to compel "such exceedingly oppressive and unreasonable construction" as to hold that the contractor had agreed that the whole incidence of the contract might be changed "at the sole will of the defendants and the whole onus of the contract altered, doubled, trebled, quadrupled, perhaps, upon the contractor."

The contract did not, as apparently assumed by the Court, reserve to the government any general right to suspend or interrupt the continuity of the work. It reserved only the right to make changes, or to annul in case of contractor's default, as will be hereinafter shown.

The Court cites in its opinion *Wells Brothers Co.* vs. *United States,* 254 U. S. 83, 86 (65 L. Ed. 148) and *Wood* vs. *United States,* 258 U. S. 120 (66 L. Ed. 495), the contracts in both of which contain specific provisions exempting the government from claims for damages occasioned by its delays. It admits, however, that no such specific exemption was inserted by the government in this contract, but attributes this in part to the carelessness of its lawyers. The more reasonable presumption is that such exemption was purposely omitted because it is well known that the insertion of such a drastic and unfair exemption will result in higher bids for the work. It would indeed be a most unprecedented rule of contract construction to permit the government to avoid this consequence of a positive exemption from liability and then permit its inclusion in the contract thereafter by interpretation on the ground that the government's lawyers were careless.

> "The contract is to be construed and the rights of the parties are to be determined by the application of the same principles as if the contract were between individuals." *Reading Steel Casting Co. vs. United States,* 268 U. S. 186, citing numerous decisions.

This contract was drawn by the government. Doubtful expressions in a contract should be con-

strued most strongly against the party who uses the language. *Garrison* vs. *United States,* 7 Wall. 688.

CONTRACT INVOLVED MUTUAL OBLIGATIONS

It is obvious from the terms of the contract that plaintiff's obligation to complete under penalty within a definite time required an expenditure of large sums of money in preparation to enable it to perform. and a continuous readiness to perform. In *United States* vs. *Speed,* 8 Wall 77, 84 (1869) this Court laid down the following rule with respect to the implication of mutual covenants:

> "Without entering into a discussion of the general doctrine of the implication of mutual covenants, we deem it sufficient to say that where, as in this case, the obligation of plaintiffs required an expenditure of a large sum in preparation to enable them to perform it, and a continuous readiness to perform, the law implies a duty in the other party to do whatever is necessary for him to do to enable plaintiffs to comply with their promise or covenant."

English Authorities.

This rule has been uniformly applied by the English courts to building contracts like the one now in suit. Those courts have had occasion to apply to it such contracts where, as here, there were provisions for extensions of time and where other contractors were involved, and in every case, after reasoning the case out on principle, have held the owner liable in damages for his delays.

The following authorities are taken from the English work, Hudson on Building Contracts, 4th Edition:

Volume 1, p. 318:

> "In the absence of express conditions there is an implied contract that the employer shall be in a position to hand over the site to the contractor as soon as the agreement is entered into." Cases cited: *Yates vs. Law*, 25 Up. Can. Q. B. 562; *Freeman vs. Hensler*, Ct. App. Q. B. decided February 20, 1900 (full opinion Vol. II, p. 292, Hudson on Building Contracts); *Philadelphia Railway vs. Howard*, 13 How. 307; *Blanchard vs. Blackstone*, 102 Mass. 343.

In *Yates vs. Law, supra*, Y. contracted to do certain work on L.'s house by November 2d. L. let the stone work to other contractors. Y. was delayed by the stone work, and sued L. for extra cost thereby occasioned. L. pleaded that Y. knew the stone work was to be done by others and therefore L. did not undertake so to proceed with the stone work as to enable Y. to perform within the time agreed. Held that the plea showed no defense, as L. must be treated as having impliedly undertaken to do what was necessary to enable Y. to proceed with his contract, and that the fact of L. having employed others, against whom Y. could have no remedy, made no difference.

In *Freeman vs. Hensler, supra*, F. contracted with H. to pull down fifteen old buildings, and erect twelve shops on the site, within six months from the signing of the contract. H. did not give possession of any part until three weeks after the extended time for the completion of the whole works. Another part was handed over about two months later, and the remainder about three months later still. Held that there was an implied contract that H. should hand over the

land to F. to enable him to carry out what he had contracted to do, and that F. was entitled to damages caused by the increased cost of working.

Volume I, page 323:

> "The employer is responsible to the contractor for the due performance by other contractors of all works which he has agreed to perform. Thus, if performance of a contract to decorate a house within a given time is dependent on the completion of the plastering by another contractor (in the building owner's employ) the building owner will be liable in damages to the decorator for delay caused by the non-performance of the plastering;" citing illustrating cases.

In *Lawson vs. Wallasey Local Board* (1883), 48 L. T. 507 (cited Vol. I, 497), L. contracted to perform certain dredging operations for the Board and complete the same by an agreed date, subject to an extension of time, if certain staging on the site be not within a reasonable time removed. The staging was not so removed. Held that L. could recover as damages for the prevention of his operation, the cost of the extra employment on his plant and workmen.

Volume I, p. 536:

> "Extension of time does not release the employer from damages for breaches of contract by delay caused by him, unless the builder covenants to accept the extension in satisfaction of his claim for damages."

Kelly, C. B. in *Roberts vs. Bury Commissioners* (1870), L. R. 5 C. P. 310, said:

> "It is provided that it shall be lawful for the architect to grant an extension of time, but it is neither said that the architect must give it * * * nor that the contractor must accept whatever extension of time the architect is pleased to give, in full satisfaction of his claim for damages.
>
> * * * * *
>
> And where an engineer has discretionary power to direct within what time a building shall be completed, this does not give him power to suspend the work indefinitely: *Lake vs. Cameron* (1859), 10 Up. Can. Q. B. 622. See also *Bush vs. Whitehaven Trustees* (1888), Vol. II, p. 122."

In the matter of arbitration between *George Trollope and others,* K. B. Div., December 1, 1913, full opinion, Vol. I, p. 849, the Court had under consideration a claim against owner for damages under a contract providing for extensions of time, which were granted, and the Court held that this extension of time did not affect the damages claimed by the contractor against the employer for not affording possession of site. The Court said, p. 857:

> "Paragraph 18 is: 'It was contended on behalf of the employer that upon the true construction of the first contract the contractors were not entitled to any damages in respect of the delay in the completion of the same attributable to any of the causes enumerated in clause 25 of the same.' That is the principal point which Mr. Sankey has argued; that the power to extend time which is given in certain events by clause 25 has the consequence of precluding a claim for damages if there is an extension of time, that is to say, that the extension of time is to be deemed to be taken as satisfying all damage. Now, I cannot think that that is what it means. There appears to me to be no reason for putting that interpretation

upon it. The clause specifies a considerable number of events, in the happening of which the architect is empowered to extend the time, and he is not only empowered, but it says that he shall make in those events a fair and reasonable extension of time for completion in respect thereof. Now, I have to look at what those events are. They are events of at least, I think, three different characters. The first two are—force majeure and exceptionally inclement weather—matters which the contractor could make a grievance of, and could say, 'It really is not my fault that I have not done it, because there was force majeure, there was inclement weather.' He could make a grievance of those things, but if he had contracted to do the work in a particular time, he takes the risk of those matters according to our laws. Therefore, although he would have a sort of grievance, and might naturally request an extension of time, he would have no clear right to it. Then the clause goes on to a different class of things 'by reason of authorized extras or additions.' Authorized extras and additions are, of course (being authorized and being contemplated by the contract), no breach of contract, and it is not a breach of contract by the employer to order something extra, but it is a thing which if so done as to make it impracticable to complete the work in the contract time, prevents the contractor being bound by his obligation to complete in the contract time, and therefore a matter which it is obviously reasonable to provide for by an extension of time.

Then there is a third thing contemplated in this clause 25, and that is the breach of contract by the employer. I do not distinguish between breach of contract by him in person and by his agent. If such breaches are committed, and if they have the consequence of preventing the contractor completing his work in the contract time, they do not give him exactly an extension of time, but they free him from the consequences of not completing in

time; whether they are penalties or whatever they are. Therefore, that again is a matter which it is desirable to provide for by giving the architect power to extend the time. Therefore all the three classes of matters which are in clause 25 are all matters as to which it is desirable to give the architect the power of extending the time, and why is that a reason for depriving the contractor of his remedy in damages for one of these three, the only one which gives him the remedy in damages? I can see no reason whatever for doing it. There is ample reason for the clause, but there are no words in it which appear to me to have the effect contended for. If the delay affects the contractor not merely in the time he has to take in order to complete the whole work, but also affects him pecuniarily in the way of damages, why, because the time has been extended, the employer should not pay the damages I cannot see. It is a simple case, that by reason of the delays of giving the orders to go on with the work in some particular, this part of the work was idle, or the clerk of the works or somebody on the spot, whom the contractor has to pay, was idle. The extension of his time will prevent the contractor from having any difficulty about time, it will prevent his being liable for not doing the work by the contract date, and give him time to do it, but it will not put back into his pocket the damage which he has sustained by reason of having the men there idle and paying them. It seems to me that he has a right to have those damages, and therefore I must decide against that contention of the employer."

In *Bush vs. Trustees of Whitehaven*, Q. B. Div. (1888), reported in full Vol. II, p. 122, the contract there involved had many strict provisions against the contractor, and among others, that "the non-delivery in the manner aforesaid of the use of such site * * *

shall not vitiate or affect the contract * * * nor entitle the contractor to any increased allowance in respect of money, time or otherwise, unless the engineer may grant him an extension of time and then only to that extent." The contract provided for the completion of work within a fixed time. The owner failed to give the contractor access to the site until almost the whole of the agreed time had elapsed. Notwithstanding the provision quoted, the court, speaking through Lord Chief Justice Coleridge, held that the contractor could enforce a claim for damages caused him by the delay in giving access to the site. He said, p. 127:

> "I think therefore that upon the true construction of this contract we are not bound to arrive at any such exceedingly oppressive and unreasonable construction, and that a reasonable time—the giving of these sites within a time that shall be reasonable for the completion of the work—either within four months or within such further extension of time as the engineer shall have given—must be taken to have been the true view of the parties and that view being consistent with the words, it must be taken to be the true construction of the words which the parties have used."

He said that to construe the contract otherwise would be to hold that the contractor had agreed that the whole incidence of the contract might be changed "at the sole will of the defendants and the whole onus of the contract altered, doubled, trebled, quadrupled, perhaps, upon the contractor." He refused to so construe the contract. He quotes with approval from *Jackson vs. Union Marine Insurance Co.*, 8 Law. Reports, Common Pleas, 581, and other cases.

The case of *Freeman vs. Hensler* is reported in full, Vol. II, p. 292. This was before Smith, Collins and Romer, L. J. J., decided February 20, 1900. The opinion in this case is very much in point. In the course of his opinion Romer, L. J., said, p. 297:

> "When an owner of a site contracts with a builder that the builder shall, within a limited time under threat of penalty, build a shop on the site for the owner, and there is nothing else in the contract as to an opposite view, in my opinion it is implied that the owner is in a position to allow the builder forthwith to commence his work; in other words, it is implied in that contract that the land shall be delivered up to the builder forthwith, so that he may be able to commence at once * * *. There was a breach, for which he (contractor) is entitled to recover damages."

AMERICAN DECISIONS.

The first case on a building contract of the character now in suit came before the Court of Claims in 1896, *Kelly vs. United States,* 31 Ct. Clms. 361, 373, where the contractor had sustained damages by reason of the failure of the government to prepare a building site on which the plaintiff had agreed to erect a court house, and that Court, following the rule of the Speed supra case, held:

> "The claimants entered into the contract, agreeing to furnish all the labor and materials necessary and to complete the erection of the building within twenty-two months, and on the faith of the contract incurred expense and otherwise made the necessary arrangement to perform their contract, keeping themselves in readiness therefor, as required by the defendants.

This imposed upon the defendants the corresponding duty of doing whatever was necessary on their part to enable the claimants to comply with their contract. This is the rule as laid down in the case of the *United States vs. Speed* (8 Wall. 77, 84)."

The impelling necessity of such an implied obligation and the fundamental principles on which it is based is convincingly shown in the following opinion in *Allamon vs. The Mayor of Albany,* 43 Barb. 33, 35.

"*By the Court,* Miller, J. By the terms of the contract between the plaintiff and the defendants, for a breach of which a recovery was had in this action, no definite time was fixed for the completion of the plaintiff's work under it, but it contained a covenant by which the plaintiff was bound 'to commence said work and proceed therewith without delay, and in such manner as not to delay the contractor for the mason work.' It will be observed that here was a positive engagement on the part of the plaintiff as to the manner in which he was to proceed with the performance of the work he had agreed to do, and a direct promise and obligation on his part that he should commence at once and proceed without delay to its completion. If the plaintiff had failed to proceed with the work and fulfill this provision of the contract without delay, he would most certainly have been liable for any damages which may have accrued to the defendants, unless the delay was caused by the default of the defendants. This covenant in the contract was, to a considerable extent, for the advantage and benefit of the defendants, and contemplated a prompt and speedy performance of the work contracted for. The plaintiff, being thus bound by his agreement, commenced and proceeded with the job without delay, and was liable in damages for a non-performance

of the covenant, which obligated him to do so. The question arises whether there was not a corresponding obligation on the part of the defendants, implied from the contract itself, that they were to have the building upon which the work was to be executed, in readiness for the plaintiff, so as to enable him to commence and fulfill this provision of the contract. Was it a provision which bound the plaintiff alone, with no agreement whatever on the part of the defendants that they were to have the building in such a condition as to enable him to fulfill the contract? If it was thus confined in its character, it would be a contract merely on one side, with no corresponding obligation, no duty to be performed on the part of the other contracting party. There would be no mutuality in such a covenant, if thus limited in its operation and effect. While on the one hand the plaintiff would be bound to incur liabilities, expend money and make arrangements to complete the contract and perform its conditions, and thereby subject himself to large expenses and losses; on the other, the defendants would be free from all liability, entirely exonerated from all obligations, and permitted to remain quiet, without doing a single thing to enable the plaintiff to perform his contract.

Suppose the plaintiff had proceeded, as he had a right to do, and provided the materials necessary to perform the work, and the defendants failed to provide the building so that he could use them until they became depreciated in value, and caused serious loss to the plaintiff; can there be a doubt that the defendants would be liable? Again: suppose they had not provided any building whatsoever, so that the plaintiff was utterly unable to perform this condition, and was damaged greatly thereby; could they then be exonerated? If they had a right to delay three months, then they were equally authorized to delay for a year, or forever, and the plaintiff was without

any redress whatever. In such a view of the question, the contract was utterly void as to the defendants, while the plaintiff was bound to perform it, and was liable for any failure to do so.

I think the covenant on the part of the plaintiff, to commence the work and proceed therewith without delay, raised an implied obligation, on the part of the defendants, to have the building in readiness for the plaintiff to fulfill this condition. By entering into such a contract the defendants agreed that they would be prepared for its performance, and it is to be assumed that the very thing essential for that purpose constituted an element of the agreement. It was a mutual covenant, binding upon both the parties; on the part of the plaintiff, that he would commence and proceed at once; and on the part of the defendants, that they would be ready to allow him to do so. Without such a mutual contract neither party could be bound; the plaintiff might take his own time, and proceed at any time he deemed best, and the defendants were not bound to provide the building for the purpose of having the work done." It was held that the plaintiff was entitled to recover damages for said delays.

The opinion in the Crook case stresses the fact that there is no specific provision in the contract whereby the government bound itself to any fixed time for the completion of the work. A similar contract was under consideration in Mansfield vs. N. Y. C. & H. R. R. Co. 102 N. Y. 205, and a similar contention was made and sustained by the lower court in an action by the contractor for damages for the delays of the owner. The appellate court reversed the lower court, holding in this connection as follows:

"It seems to us that the court below has mistaken the plain reading and import of this con-

tract. It is true that there is no express provision in it requiring the foundations, or any part of them, to be ready at any particular time. So neither is there any such provisions requiring any foundations at all to be built by the owners; but the clearest implications arise from the language of the agreement, and its avowed object and intent, that the property of the owners upon which the building was to be erected should be prepared for the superstructure by such owners, and that the contractors should have notice whenever that time arrived. It was the indispensable condition to the performance of any of the obligations incurred by the contractors that the foundations should be prepared, and unless they were to be so prepared it rendered the whole contract motiveless and nugatory * * *

It is a well-settled principle of law in the construction of contracts that when the obligation of performance by one party presupposes the doing of some act on the part of the other, prior thereto, that the neglect or refusal to perform such act, not only dispenses with the obligation of performance by the other, but also entitles him to rescind, or, when rescission will not afford him an adequate remedy, to continue the work, and recover such damages as the delinquency has occasioned against the defaulting party. *Cross v. Beard,* 26 N. Y., 88 * * *.

Looking at this contract in the light of decisions referred to, it would seem that the plainest principles of justice require the implication of a covenant on the part of the defendant to prepare the foundations in question so as to have them in a condition to enable the contractors to prosecute their work to the utmost advantage and economy before giving the notice which set the time limited for their completion in motion. Any other construction would destroy the mutuality of the agreement, and put it practically in the power of one party to defeat performance by the other.

It is quite obvious that the provisions of the contract in respect to time are of its essence, and were regarded by the parties as of primary importance; the contractors being stimulated to great diligence by the prospect of extraordinary compensation therefor, and deterred by the certainty of great pecuniary loss from dilatoriness or delay in the prosecution of their work. A construction which enabled the railroad company to retard the prosecution of the work by the contractors, or disabled them from employing all of the agencies or force which, in their judgment, could wisely and advantageously be used in its performance, would operate as a fraud upon them, and render their covenant to complete the work in five months a reckless and foolhardy undertaking. The very assumption of such a covenant on the part of the builders implies an understanding on the part of all parties that they were to be unrestricted in the employment of means to perform it and that nothing which it was the duty of the owner to do to enable the contractor to perform should be left undone. It is unreasonable to suppose that the parties intended to enter into obligations providing for the performance of work by one party, under a heavy penalty for non-performance within a given period, which yet left it optional with the other to facilitate or retard such work at its pleasure or discretion."

While the contract showed that the buildings were then being erected under contract, it is not apparent why this situation should have suggested any concern to the contractor. It was expressly provided, paragraph 6 (R. 20): "Unless otherwise specifically stated, the contractor shall be allowed reasonable space at the site of the work and access to the same for receiving, handling, storing, and working material." The Court ignores this provision or treats it as mean-

ingless, as it does the provision, paragraph 8 (R. 20) that "the contractor shall commence work immediately." These provisions certainly have their place in any proper construction of the contract as a whole. Also, the government employed the general contractors and they were its agents, and it was responsible for their acts.

Furthermore, it is important to remember that when the government prepared the contract for appellant's signature, it knew the buildings were then under construction by the contractors and the approximate dates of completion. It also knew the extent to which the heating contractor's work had to conform to the main structure. With this situation before it the government saw fit to exact from the appellant a strict agreement, under penalty, to complete its heating contract by March 19, 1918, which was 34 days after the provisional date for completing the machine shop building and 2 days after the provisional date for completion of the foundry. In all fairness, therefore, we submit there was nothing in this situation to relieve the government from the usual implied obligation on its part that it would enable claimant to comply with its contract exacted under such circumstances. Neither was it unreasonable that the government should be willing to assume such an implied obligation in return for the agreement exacted by it from appellant. While it may have contemplated possible delays by the general contractors, it knew the terms of its contract with them and the control over or recourse to them given the government by such contract. It must have taken into account that in case the general contractors delayed the work it could exact damages from them. If it failed to protect itself against such a contingency,

it was an omission the consequence of which is certainly not chargeable to appellant. As very aptly expressed in this connection by the Court in *Nelson vs. Pickwick Associated Co.*, 30 Ill. App. 333:

> "Under a provision in the specifications with other contractors, whose work preceded that of the appellant, like that in the specifications for his work, the appellees had in their hands indemnity for the increase to the price of the appellant's work. If they did not have such a provision it was their own omission, the consequence of which is not chargeable to appellant.
>
> If the appellees desired exemption from their obligations under the contract, they should have put such exemptions in clear language that would have put appellant on his guard, and left no doubt as to what was intended."

The real situation and the soundness of our construction of the contract, is reflected in the following from opinion in *Cotton* vs. *United States*, 38 Ct. Clms. 536:

> "That there was delay in the dredge work that prevented plaintiffs from completing the wharves is beyond dispute. That it was unreasonable delay by the dredge contractors is evidenced by the fact that the defendant deducted from their pay upon the contract $16,150. That plaintiffs were not at fault in the delay of the completion of the wharves is evidenced by the fact that defendant extended from time to time the time of such completion, and when that was accomplished paid them in full, without deduction, the contract price, and this, too, without prejudice to this suit. In truth, from a consideration of the whole evidence it is indisputable that the reasons for the delay put upon plaintiffs was well understood

during the time of its occurrence and duration, and the officers of the defendant did all they could to lessen the worst effects of it. Part of the time covered by the delay so occasioned plaintiffs obtained and performed other work and received compensation therefor, and a portion of the time of their employees was also covered by employment, at less wages, however, than plaintiffs were obliged to pay them. Upon the findings we feel warranted in the conclusion that justice requires that defendant compensate the plaintiffs for the reasonable damages the latter have sustained in consequence of the delay in the prosecution of their work, caused by defendant's dredge contractors' failure to diligently prosecute their work. The right of this conclusion, it seems to me, is made more manifest by the fact that defendant has indemnified itself by deductions from the pay of the dredge contractors."

In *Stehlin-Miller-Henes Co. vs. City of Bridgeport* (Conn.), 117 Atlan. 811, the suit was by a heating and ventilating contractor against the owner for damages for delays caused by the general contractor, and the Court held as follows on p. 813:

"The rule is undoubted in circumstances such as were present in this case that an implied contract arose on the part of the defendant to keep the work on the building, whether done by itself or other contractors, in such a state of forwardness as would enable the plaintiff to complete its contracts within the time limited. *Allamon vs. Albany*, 43 Barb. (N. Y.) 33; *Mansfield vs. New York Central R. Co.*, 102 N. Y. 205; *Booth & Rogers Co. vs. Board of Commissioners*, 274 Fed. 659; *Tobey vs. Price*, 75 Ill. 645; *Hutt vs. Hickey*, 67 N. H. 411; 9 C. J. 715, note 66 (e)."

That courts have regularly imposed this implied obligation on the owner, not only for his own delays, but also for the delays of his contractors, where such delays prevented timely performance by the plaintiff contractor, is further shown by the following decisions:

In *Indianapolis N. T. Co., vs. Brennan* (Ind.), 87 N. E. 215, the delays of the owner railroad company were due to the delay in the construction of the road by another contractor, and the court held:

> "Certainly, when appellant company obligated these parties to do and finish the work within a fixed period, it was its duty to afford them a fair and reasonable opportunity to begin and complete the work; or, in other words, under the mutual contract entered into between it and them, it became its duty to furnish the required material, secure the right of way, and have the road grade in readiness, as required by the contract, so that appellees, in the exercise of reasonable diligence, might begin and finish the work within the prescribed period without being subjected to unreasonable cost or expenses on account of the default, delays and hindrance of appellant. Its default or failure in these respects would subject it to liability for whatever damages appellees might reasonably sustain on that account. If appellant violated or breached its contract, as alleged, by the defaults, delays, and hindrances charged against it, and thereby prevented appellees from beginning and completing the work which they had contracted to do, the law would hold it liable for the reasonable work or value of the work which they performed, and also for the loss sustained, if any, on account of their being prevented or not allowed by appellant to complete the work which they had undertaken to perform."

In *See vs. Partridge* (N. Y.), 2 Duer's Rep. 463, the delays complained of were due to other contractors and the Court held:

> "The plaintiffs were unconditionally bound to do the carpenter's work within a specified time. To accomplish this, they must not only provide the materials but employ the necessary hands. It was the legal duty of the defendant to keep the mason work in such a state of forwardness as to enable the plaintiffs to perform their contract. For the damages resulting from a clear breach of this duty he should be held liable."

The decisions are to the same effect on contracts providing time extensions for delays.

In *Robert Grace Contracting Company vs. Chesapeake & Ohio R. R. Co.* (C. C. A.), 281 Fed. 904, 907, it was held:

> "Nor will the extension of time which the engineer was to allow where there was delay by the railway company, and which was in fact given, serve to defeat, necessarily, all recovery claimed in the right of way branch of the case. It cannot be inferred that delay which threw the work over into the war period and enormously increased the cost of performance was intended to be neutralized merely by a corresponding extension of time."

In *Selden-Breck Construction Co. vs. Regents of U. of Mich.*, 274 Fed. 982, the contract provides that should the contractor be delayed in the prosecution of the work by reason of delays by other contractors, or through the owner, the time for completion should be extended for a period equivalent to the time lost. The Court held in this connection as follows at p. 984:

"The contention of defendant that this provision limits and measures the extent of the rights and remedy of the plaintiff in the event of delay occasioned through the fault of the defendant and deprives the plaintiff of the right to recover damages caused through such delay cannot, in my opinion, be sustained. In the absence of an express stipulation relieving the defendant from liablity for damages caused by its breach of this contract, it would, of course, be liable therefor. The language of the provision thus invoked and relied upon by defendant as a basis for exemption from such liability certainly does not in terms provide for such exemption, and to have that effect a meaning must be read into it which is not expressed in the words used. There seems to be no ambiguity in this language. It merely provides that if the plaintiff be delayed through the fault of any other contractor employed by the defendant, or through the defendant, 'the time of completion shall be extended for a period equivalent to the time lost.' The 'time of completion' is obviously the period of time referred to in the clause of the contract, copy of which is attached to the declaration, providing that the plaintiff 'is to complete the entire work upon or before January 1, 1918.' The purpose, then, of the condition invoked by defendant, is, manifestly, to relieve the plaintiff from the consequences of a failure on its part to complete its work by the date mentioned, if such failure be caused by the fault of the defendant, by allowing to the plaintiff an extension of the time of completion for a period 'equivalent to the time lost by reason of such fault of defendant.' That this was intended to be an allowance, and not a limitation upon, the plaintiff, is further indicated by the concluding clause in this section providing that such an 'allowance' will not 'be made' unless a claim therefor is presented within the time therein specified.

Although some authority is cited apparently to

the contrary I am unable to accept the reasoning or agree with the conclusion involved in the theory of the defendant in support of this contention. I am satisfied that the provision in question, properly construed, was intended to, and does, create an exemption in favor of the plaintiff, and not of the defendant, and that to interpret it otherwise would be to import into it a meaning which the parties thereto have not themselves expressed. *Nelson v. Pickwick Associated Co.,* 30 Ill. App. 333; *W. H. Stubbings Co. vs. World's Columbian Exposition Co.,* 110 Ill. App. 210; *Del Genovese vs. Third Avenue R. R. Co.,* 13 App. Div. 412, 43 N. Y. Supp. 8; Id., 162 N. Y. 614, 57 N. E. 1108."

In *William Cramp & Sons vs. United States,* 41 Ct. Clms. 164, the Court had under consideration a similar contract providing for extension of time and suit for damages for the government's delays, and it was contended by the government that the provision allowing the contractor additional time, afforded him the only relief against such delays. The Court denied this contention in the following opinion:

"The claimant could have completed the vessel within the time agreed upon but for the default of the Government; and to hold that the granting of additional time for such default precludes the claimant from the recovery of damages, if otherwise entitled thereto, would, it seems to us, be reading into the contract a provision not in the minds of the parties when the contract was entered into.

From the language of the ninth clause of the contract it is evident that what was in the minds of the parties was that if, through the fault of the claimant, the vessel was not completed within the contract time, then the penalties by way of

deduction from the contract price might be imposed; but if delayed by the fault of the Government, then additional equivalent time should be allowed, not in lieu of compensation for damages for such delay, but to enable the claimant to proceed to complete the vessel. But for that provision in the contract for additional time, the delay caused by the Government (the claimant having performed its part) would have discharged the claimant from further performance and left it with a right of action for damages on the obligation growing out of the breach. Or the claimant might have continued to perform, reserving to itself the right to sue for such damages as it may have sustained. On the other hand, as the claimant by the terms of the contract agreed that additional time should be allowed, equivalent to such delay, it thereby waived its right to terminate the contract for that cause; but the question of waiving its right to damages growing out of such delay was certainly not in the minds of the parties at the time the contract was entered into.

Nor was the granting of such additional time intended by the parties to operate as an estoppel against the claimant from seeking redress for damages it may have sustained by reason of the default of the Government. Certainty is an essential element in all estoppels, and the rule should not be applied unless the recitals in the contract are clear and conclusive against the claimant. Courts will not suffer a party to be deprived of a right without his consent, and such consent cannot be inferred from the mere granting of additional time without any fault on the part of the claimant.

The claimant being without fault in the delay, no penalty could have been imposed upon it without gross error akin to fraud, from which relief would have been granted by the courts. The granting of such additional time was clearly for the benefit of the Government, as it thereby pre-

vented the termination of the contract and saved it the expense of reletting the work to other contractors. Any other construction of the contract, it appears to us, might result in irreparable damage to the claimant, for if the Government is not to be held responsible in damages for its delay by reason of a corresponding extension of time, then it may delay the work indefinitely and exonerate itself by the mere granting of additional time in which to enable a contractor to complete his work.

But this objection, the defendants says, should have been considered by the claimant at the time of entering into the contract, and that if not satisfied therewith it could have declined to so contract. This would be true if the contract clearly so recited, or if the language used was susceptible of no other conclusion. We do not think the language used can be construed to exclude claims for damages arising out of such a breach; and if not, then the extension of time would not operate to deprive the claimant of its right to a recovery therefor.

Nor does the doctrine of *expressio unius est exclusio alterius* apply. That doctrine is not of universal application, and is always subject to the intention of the parties, evidenced by the contract.

It was not necessary to write into the contract that in case of breach the party injured should be entitled to redress for the damages thereby sustained. That right accrued when the default took place, and it would be no answer to say that because additional time is provided for in the contract therefore no breach occurred, for the extension of time is dependent upon a breach—that is to say, delay caused by the Government in the prosecution of the work.

On this branch of the case, therefore, we reach the conclusion that a corresponding extension of time for the delay caused by the Government was not intended by the parties to conclude the claim-

ant or deprive it of the right to maintain an action for any damages it may have sustained by reason of such delay."

This case was reversed by this court (206 U. S. 118), but on an entirely different ground. See in this connection *Cramp vs. U. S.* 216 U. S. 494, where a similar claim was allowed.

A similar contention was also made on the contract involved in *Kelly vs. United States,* 31 Ct. Clms. 361, supra, and the Court held as follows:

> "Therefore, to enable the claimants to complete the work under their contract within the time specified, and thereby avoid the forfeitures, they were to have one additional day thereto for every day they were delayed through any fault of the defendants.
>
> But this recompense, in respect to time, was not intended to be in lieu of damages which the claimants might suffer by reason of such delay, nor can the language be so construed.
>
> The provision is in the nature of an indemnity to the claimants against delay in the execution of their contract through any fault of the defendants."

A similar contention was made in the case of W. H. *Stubbings Co. vs. World's Col. Ex. Co.,* 110, Ill., App. 210, and denied by the Court. It was likewise made in *Nelson vs. Pickwick Associated Co.,* 30 Ill. App. 333, 336, and disposing of it the Court said:

> "The provisions for the extra time was for the avoidance of the penalty the appellant would incur if he did not complete his contract on time. In its language it purports a benefit to him; an allowance, not a deprivation, of his right to require the work to be in readiness for him."

NO GENERAL RIGHT OF SUSPENSION RESERVED TO THE GOVERNMENT

The Court's opinion apparently proceeds on the assumption that the contract reserved to the government a general right to suspend or interrupt the coninuity of the work. This is in error. There was only reserved the right to make changes, paragraph 17 (R. 23) or to annul the contract, paragraph 16 (R. 22). The contractor was not concerned with the latter, as it was conditioned on its default. Neither was it concerned with the former, because in the very paragraph making the reservation, specific provision was made for appropriate readjustment of the contract price. For changes by additions prolonging the contract time, the contractor would be paid his "estimated actual cost" thereby occasioned. This carried with it full compensation for any such reasonable delays, as well as the extra work involved in such a change. Of course "nothing more is allowed for changes." The Court says it would be strange if the government were bound for "more" in respect of matters presumably beyond its control. We are not asking that it be held for "more" for other delays, but merely that it be allowed the same, that is, for the "actual cost" thereby occasioned.

While paragraph 8 (R. 20) provided that "the contractor shall commence work immediately after delivery to him of copy of the contract, and continue without interruption unless otherwise directed by the government," it is obvious that the last phrase refers only to such interruptions as the government had elsewhere properly reserved the right to make, namely, to make changes or to annul in case of contractor's de-

fault. A general right of suspension or stoppage of the work with exemption from liability therefor, would be a drastic provision and carry with it the power to greatly damage and possibly ruin the contractor and leave him without recourse. Such a power surely should not be presumed from general terms, but should be reserved in direct and positive provisions, the purport of which could not be misconstrued by the other party to the contract. Nelson v. Pickwick Associated Co. supra.

The government not having reserved to itself any general right of suspension, it is difficult to see why this case does not come within the authority of *United States vs. Smith,* 94 U. S. 214, which has been frequently cited by the Court of Claims as its authority in these cases. In that case the Court held:

> "The only questions presented in this case relate to the liability of the United States for damages growing out of the suspension of the work under the contract sued upon. In effect, the contract bound Smith to furnish the materials and erect the buildings, the labor being performed by the soldiers at the Fort, except to the extent that skilled workmen were necessary. There was no time specified within which the work must be done, neither was there any power reserved by the United States to direct its suspension. Under such circumstances, the law implies that the work should be done within a reasonable time, and that the United States would not unnecessarily interfere to prevent this."

While there was a positive order of suspension in that case, and mere inaction in the instant case, that difference is not material. In *Blanchard vs. Black-*

stone, 102 Mass. 343, the plaintiff sued on a written contract to build a lock-up for the town, and averred that he was ready to perform his contract, but that the defendants hindered him. The Court held:

> "The agreement did not fix the spot on which the building was to be erected. It was therefore the duty of the town to furnish a place. If the town unreasonably omitted to perform this duty, it was as much a hindering and preventing of the performance of the agreement by the plaintiff, as if the town had expressly refused to select the place, or had done any other affirmative act to interrupt his performance of the agreement."

GOVERNMENT'S ACTS NOT TO BE REGARDED AS UNAVOIDABLE AS TO GOVERNMENT ITSELF

The Court observes that the provision that acts caused by the government will be regarded as unavoidable (paragraph 14, R. 21), which though probably inserted primarily for the contractor's benefit as a ground for extension of time, "is not without a bearing on what the contract bound the government to do." It is not believed that the Court attaches much importance to this inference, or will adhere to it upon full consideration. It will be observed that this clause is found in the "General Provisions" which were incorporated in the contract by reference (R. 5), and bears date August 1, 1916, more than a year preceding the date of this contract, August 14, 1917, and the term, "General Provisions," shows that they are prepared for insertion in bureau contracts generally. The language therefore must be construed, as intended, to make it applicable to contracts generally. Furthermore,

the connection in which it is used makes its meaning perfectly clear. It is used in a paragraph headed "Unavoidable Delays," which are obviously being defined for the sole purpose of extensions of time. The opening sentence is "Unavoidable delays are such as result from causes which are *beyond the control of the contractor.*" The delays are then enumerated, including delays due to the acts of the government; obviously meaning merely that the delays of the government are to be regarded as unavoidable for the purpose of time extension, because *beyond the control of the contractor.* The government obviously controls its own acts, and it is unreasonable to impute to the government an intention to have the contractor agree that all of its acts are to be regarded as unavoidable for all purposes. As was said by Lord Escher, Master of the Rolls, in *Dodd vs. Churton,* I Q. B. 562:

> "One rule of construction with regard to contracts is that when the terms of a contract are ambiguous and one construction would lead to an unreasonable result, the court will be unwilling to adopt that construction."

OTHER CLAUSES OF CONTRACT EXAMINED.

While plaintiff agreed to accept in full satisfaction for all work done under the contract the contract price reduced by damages deducted for his delays and increased or reduced by the price determined for changes, and that the contract price should cover all expenses of every nature connected with the work to be done, it is obvious that each of these clauses was intended to be restricted to the particular connection in which used. Paragraph 13 (R. 21) defines liquidated

damages for the contractor's delay and has the contractor agree and consent "that the contract price, reduced by the aggregate damages so deducted, shall be accepted in full satisfaction for all work done under the contract." The meaning of this language must necessarily be restricted to paragraph 13, because it would otherwise be inconsistent with paragraph 17 (R. 21) on changes. Paragraph 17 has the contractor agree and consent "that the contract price thus increased or decreased shall be accepted in full satisfaction for all work done under the contract." This meaning must likewise be restricted to this particular paragraph, as otherwise it would be inconsistent with the language in paragraph 13. Paragraph 18 (R. 23) providing that "the contract price shall cover all expense, of whatever nature or description, connected with the work to be done under the contract," obviously has no other purpose than to provide against unjustifiable claims for extra work.

Since the meaning of each of these clauses when considered separately is clearly intended to extend only to the subject of the particular paragraph in which used, they cannot merely by being considered collectively be construed to include something not included or contemplated in either, namely, to shut out claims for damages for breach of contract by the government.

The government drew this contract, and if it desired exemption from such liability it should have so provided in specific terms, as was done in *Wells Brothers C. vs. U. S.* and *Wood vs. U. S., supra.* Not having done so, it should not be read into the contract by a strained construction of clauses inserted for other specific purposes.

When this contract was drawn in 1917 the parties could not have understood that its general frame excluded claims for the government's delay and made a specific exemption clause unnecessary. The law was then to the contrary. See practically identical case in Sanborn vs. United States, 47 Ct. Clms, 254, 281 (1911).

CONCLUSION

The foregoing shows an unbroken line of English and American decisions running back nearly a hundred years, holding that when a contract obligates a contractor under penalty to complete a work within a definite time, and this obligation requires the contractor to expend money in preparation to perform and to continue in readiness to perform, that such obligation imposes upon the owner the corresponding duty of doing whatever is necessary on his part to enable the contractor to comply with his contract, and renders the owner liable in damages for breach of this duty; and further that the situation is not changed by contract provisions for extension of time, or where it appears that there are other contractors, employed by the owner, whose work must precede that of the plaintiff. It was in reliance upon this long line of well reasoned authorities that the Court of Claims held in *H. E. Crook Co. vs. United States*, 59 Ct. Clm. 348, involving a similar claim:

> "The law governing such cases is well established, and has been repeatedly asserted by this Court and by the Supreme Court of the United States," and citing cases.

We respectfully submit that there is nothing in this contract to distinguish it in principle from this line of authorities; and if the doctrine of implication of mutual covenants announced in the Speed Case, *supra*, and so unqualifiedly and uniformly affirmed and reaffirmed in both English and American cases is sound, the decision in this case should be reversed.

Neither will it be easy in the future for courts to

distinguish *any* such cases from the Crook case, if this decision is allowed to stand. This decision, in other words, will for all practical purposes overrule the foregoing long line of authorities on building contract law and render them without effect so far as our courts are concerned. The Court of Claims has already interpreted the Crook decision as authority for dismissing cases where the acts complained of were the acts of the government itself and not of other contractors. See *Lange & Bergstrom vs. United States,* C-930 and C-931, and *Converse & Co. vs. United States,* C-1202, both decided February 15, 1926. Also see *Walter D. Lovell vs. United States,* B-306, decided February 23, 1926.

Inasmuch as this Court made no reference to the foregoing line of authorities, but confined its opinion to the language of the contract itself, it is not believed that the Court intended in this decision to announce a new principle of building contract law. We do believe, however, that the Court will be convinced on reconsideration that if the opinion is allowed to stand it must have that effect; and that this court will not be willing in this indirect manner to strike down such a line of authorities. It is respectfully submitted, therefore, that a rehearing should be granted.

Respectfully submitted,

Bynum E. Hinton,
George M. Brady,
Attorneys for Appellant.

INDEX

CASES CITED

STATUTES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 122

H. E. CROOK COMPANY, INC., APPELLANT

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The findings and opinion of the Court of Claims in this case were filed on April 28, 1924, and are reported in 59 Ct. Cls. 593. They appear in the transcript of record, pages 33 to 36, inclusive.

JURISDICTION

The Court of Claims rendered a judgment, dated April 28, 1924, dismissing the petition and in favor of the United States in the sum of $11.94 for costs. (R. p. 37.) An appeal by the plaintiff was allowed

on June 23, 1924, under Section 242 of the Judicial Code. (Later repealed by the Act of February 13, 1925, c. 229, 43 Stat. 936, 941.)

STATEMENT OF FACTS

The appellant commenced an action against the United States to recover the sum of $15,224.03 as damages for the failure of the Navy Department to have ready buildings in which the appellant was to install heating systems. (R. pp. 1–32.) The facts as found by the Court of Claims, based upon the stipulation of the parties, may be briefly stated as follows:

On August 14, 1917, the appellant entered into a contract with the United States by which it agreed, in consideration of the payment of $71,945, to furnish and install two heating systems, one in a foundry building and another in a machine shop building, which buildings were then under construction at the Navy Yard at Norfolk, Va., and to complete the work within 200 calendar days from the date of the delivery to it of the written contract. (R. pp. 1, 4, 33.) A copy of the contract was delivered to the appellant on August 31, 1917, thereby making the date of completion March 19, 1918. (R. p. 33.) A copy of the contract is attached to the petition (R. pp. 4–32) and is made a part of the findings by reference (R. p. 33).

The contract provided that the Navy Department should furnish outside hot-water flow and

return pipes. This was not done until March 1, 1919, almost one year after the original date set for the completion of the work. (R. pp. 33-34.) The buildings in which the heating systems were to be installed were not completed within the time contemplated when the contract was executed. The appellant could not therefore begin installation in the foundry building until May 27, 1918, and in the machine-shop building until August 15, 1918. (R. p. 34.)

It appears that the appellant, notwithstanding the breach of the contract on the part of the Government, went on with the work under the terms of the contract without making any demand upon the appellee either as to increased wages or as to the additional premium on the bond. (R. p. 36.)

The Government extended the contract time 387 days. (R. p. 34.)

During the prosecution of the work wages increased. The appellant paid the sum of $6,439.86 for wages in excess of the amount it would have had to pay if the work had been begun upon the date contemplated for the commencement thereof. The appellant also paid to the surety company the sum of $719.45 as an additional premium on the bond, which premium accrued subsequent to the completion date of said contract by reason of the extra time required for completing the installation of the heating systems. (R. p. 34.)

The work was completed on December 8, 1919, and accepted as satisfactory by the Navy Depart-

ment. The appellant received the full contract price of $71,945. (R. p. 35.)

The specifications of the contract, which are made a part of the findings by reference, contain the following relevant provisions:

> 2. *General Intention.*— * * * The foundry and machine shop buildings are now being erected. The approximate contract date of completion for the foundry is March 17, 1918, and for the machine shop is February 15, 1918. It is intended that the contractor for the heating shall work in conjunction with the general contractors to obtain the best possible results with the least interference or delay. The heating systems shall be completed on or before the contract dates for the completion of the buildings. (R. p. 5.)
>
> * * * * *
>
> 6. Damages for delay in accordance with the provisions of paragraph 13 of the "General Provisions," amended, shall be at the rate of $20 per calendar day for each building. (R. p. 6.)
>
> * * * * *
>
> 11. *Continuance of Work After Time.*— It is mutually understood and agreed that in the event of the work not being completed within the time allowed by the contract, said work shall continue and be carried on according to all the provisions of said contract, unless otherwise directed by the Government, in writing, and said contract shall

be and remain in full force and effect during the continuance and until the completion of said work, unless sooner revoked or annulled according to its terms. *Provided,* That neither an extension of the time beyond the date fixed for the completion of said work nor the permitting or accepting of any part of the work after said date shall be deemed to be a waiver by the Government of its rights to annul or terminate said contract for abandonment or failure to complete within the time specified or to impose and deduct damages as hereinafter provided. (R. p. 21.)

12. *Extension of Time.*—For causes of the character hereinafter enumerated extensions of time for the completion of the work may be allowed. Should the contractor at any time consider that he is entitled to an extension of time for any cause, he must submit in writing to the officer in charge an application for such extension, stating therein the cause or causes of the alleged delay. The officer in charge will refer the same at once, with full report and recommendations, to the Navy Department, Bureau of Yards and Docks, for consideration and for such action as the circumstances may warrant. The failure or neglect of the contractor to submit, as above provided, his claim for extension of time within 30 days after the happening of the cause or causes upon which his claim is predicated, shall be deemed and construed

as a waiver of all claims and right to an extension of time for the completion of the work on account of the alleged delay, and the contractor agrees to accept the finding and action of the Navy Department, Bureau of Yards and Docks, in the premises as conclusive and binding. (R. p. 21.)

13. *Damages for Delay.*—In case the work is not completed within the time specified in the contract, or within such extension of the contract time as may be allowed, it is distinctly understood and agreed that deductions at the rate named in the specifications of the work shall be made as liquidated damages and not as penalty from the contract price for each and every calendar day after and exclusive of the date within which the completion was required up to and including the date of completion, said sum being specifically agreed upon as a measure of damage to the Government by reason of delay in the completion of the work; and the contractor agrees and consents that the contract price, reduced by the aggregate damages so deducted, shall be accepted in full satisfaction for all work done under the contract. (R. p. 21.)

14. *Unavoidable Delays.*—Unavoidable delays are such as result from causes which are beyond the control of the contractor, such as acts of Providence, fortuitous events, inevitable accidents, abnormal conditions of weather or tides or strikes of such scope and character as to interfere materially with the

> progress of the work. Delays caused by acts of the Government will be regarded as unavoidable delays. Delays in securing delivery of materials, or by rejection of materials on inspection, or by changes in market conditions, or by necessary time taken in submitting, checking, and correcting drawings, or inspecting material, or by similar causes, will not be regarded as unavoidable. Should any delay in the progress of the work seem likely to occur at any time, the contractor shall notify the officer in charge in writing of the anticipated or actual delay, in order that a suitable record of the same may be made. (See par. 12.) (R. pp. 21–22.)

Paragraph 16 of the specifications provides that—

> If at any time the progress of the work shall have been such as to show that the work cannot be completed within the time allowed, or should any provision of the contract be violated by the contractor—

the Government may declare the contract "null and void." The paragraph also contains provisions as to the procedure to be adopted to protect the rights of the Government and to procure completion of the work in the event of the contractor's default. (R. pp. 22-23.)

Paragraph 18 provides:

> 18. *Extras.*—The contract price shall cover all expenses, of whatever nature or description, connected with the work to be

> done under the contract. Should the contractor at any time consider that he is being required to furnish any material or labor not called for by the contract, a written itemized claim for compensation therefor must be submitted by him to the officer in charge, who will refer the same at once with full report and recommendation to the Navy Department, Bureau of Yards and Docks, for decision and formal order covering approved items, if any. The failure or neglect of the contractor to present as above his claim for material or labor alleged to be extra within 60 days after being required to furnish or perform the same shall be deemed and construed as a waiver of all claim and right to additional compensation for the furnishing or performance of the alleged extra material or labor, and the contractor agrees to accept the finding and action of the Navy Department, Bureau of Yards and Docks, in the premises as conclusive and binding. (R. p. 23.)

The Court of Claims, in dismissing the petition, made the following pertinent statements (R. pp. 35-36):

> The facts found in this case are taken from the stipulations of the parties as to what the facts are. No evidence appears in the record, and the court is therefore compelled, in arriving at its decision, to rely upon the facts as agreed to by the parties.
>
> What contract work had been done, if any, before the date for the completion of the

contract does not appear. What quantities of necessary materials had been purchased and delivered at the site and when they were purchased and delivered does not appear. What negotiations were entered into between the parties, when it was found that the work could not be begun on the date fixed in the contract, does not appear. What, if any, demand was made on the defendant for additional compensation by reason of the increase of wages, or when such a demand was made, if any, does not appear.

We draw no inference from the failure of the parties to include these relevant facts in the stipulations, except that without them the plaintiff must be held to have elected to go on with the work under the terms of the contract.

CONTENTIONS OF THE PARTIES

The appellant contends that the "Government's breach (was) not waived by the contractor proceeding with the work."

The Government contends that under the terms of the contract it is not liable in damages for any delays.

ARGUMENT

The appellant entered into a contract with the United States, which is made a part of the findings of fact by reference. (R. pp. 4–32, 33.) In this contract the rights and duties of the respective parties are to be found and are carefully defined. Under the terms of this contract the Government

was to furnish hot-water flow and return pipes and the buildings in which the heating systems were to be installed. There is no question as to the obligation of the United States to have these buildings ready for the appellant. The performance of this obligation on the part of the Government was merely a condition precedent to the duty of the contractor to install the heating systems within the period mentioned in the contract.

The parties to a Government contract may provide that the Government shall not be liable in damages for any delays caused by it. *Wells Bros. Co.* v. *United States*, 254 U. S. 83; *Wood* v. *United States*, 258 U. S. 120.

Before entering into this contract and by its very terms the appellant was informed that "the foundry and machine shop buildings are now being erected," that the contract dates for their completion were approximated or estimated, and that "it is intended that the contractor for the heating shall work in conjunction with the general contractors." (R. p. 5.) The possibility that either party might be the cause of delays was clearly considered by the parties to this contract, as shown by the provisions of the contract heretofore set forth at pages 4 to 7. In the event that the contractor failed to perform on time, it was specifically provided that it should be liable in damages "at the rate of $20 per calendar day for each building." (R. p. 6.)

The contract is silent about the imposition of liability on the Government for damages in the event that it is the cause of delays. The aforementioned paragraphs did provide, however, that where the Government is the cause of delays as determined by its own officers the contractor is entitled to extensions of time within which to perform; and such extensions were duly granted.

The reasonable conclusion is that the parties to this contract, contemplating possible delays caused, as in this case, by the inability of the Government to have the buildings ready or the hot-water tubes available because of the defaults of other contractors, saw fit not to provide for any liability on the part of the Government in damages for such delays. Under such provisions of the contract the Government is not liable in damages for the delays. *Chouteau* v. *United States,* 95 U. S. 61, 68; *Richard* v. *Clark,* 88 N. Y. Supp. 242, 43 Misc. 622; *Haydnville Min. & Mfg. Co.* v. *Art Institute,* 39 Fed. 484, 486.

Paragraph 11 of the contract expressly provides that in the event of the work not being completed within the contract time, said work should continue and be carried on " according to all the provisions of said contract " unless otherwise directed by the Government " and said contract shall be and remain in full force and effect during the continuance and until the completion of said work, unless sooner revoked or annulled according to its terms."

The work was not completed within the contract time. It was completed afterwards by the appellant, who continued and carried on the work, according to the terms and provisions of said contract, without complaint or objection, and was paid the price therein stipulated. When the appellant elected to continue the work after time for performance had passed, it must be held to have elected to continue the work as provided in the contract "according to all the provisions of said contract," which included the price to be paid; and the appellant can not now be heard to complain or make further claim with respect thereto.

The contract clearly contemplates that there might be delays on the part of the contractor or on the part of the Government. It makes full provision for the remedies which the Government shall have in the event of a delay by the contractor. It also makes full provision that if the Government delays, the remedy which the contractor shall have is an extension of time, if seasonably requested. This right to an extension of time is the only right given to the contractor in the event of delays by the Government and was apparently intended to be the exclusive right of the contractor for any such delays. Therefore, when the contractor experienced these delays, the Government granted, as contemplated by the contract, additional time for the completion of the work. When such additional time was granted and the contractor completed the

work without objection or demand, the Government owed the contractor nothing further under the contract or the rules of law applicable thereto.

Moreover, paragraph 18 of the contract provides that " the contract price shall cover all expenses, of whatever nature or description, connected with the work to be done under the contract." (R. p. 23.) The cost of this work, as required by law, was thus sought to be fixed by and limited to the contract price. The only exception thereto concerning an increase in price is contained in the further provision that claims for additional compensation for " alleged extra material or labor " must be submitted in writing " to the officer in charge, who will refer the same at once with full report and recommendation to the Navy Department, Bureau of Yards and Docks, for decision and formal order covering approved items," that " the failure or neglect of the contractor to present as above his claim * * * shall be deemed and construed as a waiver of all claim and right to additional compensation," and that " the contractor agrees to accept the finding and action of the Navy Department, Bureau of Yards and Docks, in the premises as conclusive and binding."

The present claim is not one for additional compensation for alleged extra material or labor; but even if it could be so regarded, it does not appear that the contractor complied with the terms and conditions of this paragraph by properly present-

ing such claim, or why the finding and action of the Navy Department in rejecting such claim, if presented, should not be conclusive and binding on the appellant. *Plumley* v. *United States*, 226 U. S. 545.

The judgment of the Court of Claims should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
HERMAN J. GALLOWAY,
Assistant Attorney General.
JOSEPH HENRY COHEN,
Special Assistant to the Attorney General.

JANUARY, 1926.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 122

H. E. CROOK COMPANY, INC., APPELLANT

v.

UNITED STATES

MOTION OF C. NEAL BARNEY TO BE ALLOWED TO FILE A BRIEF Amicus Curiae On Petition for Rehearing

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v.

UNITED STATES.

No. 122.

MOTION TO BE ALLOWED TO FILE A BRIEF AMICUS CURIAE.

Now comes C. Neal Barney, a member of the Bar of this Court, and moves that he be permitted to file a brief in the above entitled cause *amicus curiae*.

The contract the interpretation of which is in issue in this cause is one of a number of Government contracts of practically similar form and content, and in a matter in which the mover is counsel its interpretation is at present in controversy. The construction of the contract accordingly involves greater issues than those between the parties. As the opinion has the effect of reversing what has long been considered to be settled law, the potential disaster to contractors renders a rehearing important.

Respectfully submitted,

C. NEAL BARNEY

BRIEF OF AMICUS CURIAE.

The Issue.

The issue in this proceeding is the interpretation of a Government contract set forth in the record.

No opinion is expressed in this brief as to the right of the appellant to recover on the facts of the case, but it is contended that the construction of the contract in the decision as prepared means an overturn of law that will work hardship to many contractors.

Argument.

I. THE DECISION.

The decision in the instant case is predicated on the view that the contract did not bind the Government with respect to the time of completion, or in other words, that the Government might delay the progress of the work without responsibility for such delay. In support of this, four assertions are made in the opinion.

FIRST.—The opinion says, "The Government reserved the right to make changes and to interrupt the stipulated continuity of the work. *Wells Bros. Co.* v. *United States*, 254 U. S. 83, 86, 65 L. ed. 148, 150, 41 Sup. Ct. Rep. 34."

The provision for changes is contained in Paragraph 17 of the General Provisions (Record, p. 23). This paragraph specifically provides, however, that if changes are made "the cost of such changes shall be estimated * * * and when approved * * * *shall be added to or deducted from the contract price.*"

The reservation of the right to interrupt the stipulated continuity of the work is contained in Paragraph 8 of General Provisions (Record, p. 20). It requires the con-

tractor to "continue without interruption unless otherwise directed by the Government," that is to say, unless the Government makes changes in the contract, in which case, as shown above, the contract price is to be altered as provided in Paragraph 17.

As the opinion now reads, the Government might delay the contractor for ten years and then direct him to complete the contract, and sue him if he failed to do so. The contract certainly was not intended to mean this.

SECOND.—The opinion says, "The contract showed that the specific buildings referred to were in process of construction by contractors who might not keep up to time."

But the contract specifically sets forth, as the opinion states, the approximate completion date for the foundry and machine shop. This was an assurance to the contractor that he was justified in establishing two hundred days as the time within which he could complete his work. The last sentence in paragraph numbered 2 (Record, p. 5) is, "The heating system shall be completed on or before the *contract date* for the completion of the building." There is no warning in this statement that justifies the contractor when bidding in assuming that the building contractors will be "behind-hand nearly a year." His date is fixed, whether the other contractors keep up to time or not.

THIRD.—The opinion says, "There is not a word in the instrument by which" the Government bound itself to a fixed time for the work to come to an end "unless an undertaking contrary to what seems to us the implication is implied."

It is not stated what this implication is based on except the assertions referred to above. The general rule of law

is that where a contractor is obligated to perform within a certain time, there is an implied obligation on the other party (in this case the United States) to do every prerequisite act expressly or impliedly demanded of it by the contract, and not to do anything to delay completion.

United States v. *Speed*, 8 Wall., 77, 84;
United States v. *Smith*, 94 U. S., 214;
Nugent Corporation v. *United States*, 50 C. Cls., 847;
United States v. *Muller*, 113 U. S., 153;
United States Fidelity & Guaranty Co. v. *United States*, 53 C. Cls., 561.

The cases of *Wells Bros. Co.* v. *United States*, 254 U. S., 83, and *Wood* v. *United States*, 258 U. S., 120, cited in the opinion, strikingly emphasize the difference between the contracts there at issue and the contract in the instant case. In both of those cases there was *express provision* that no claim should be made for damages from delay caused by the Government. They only emphasize that when the Government intends to be released from liability for delay it prepares its contracts so as clearly to do so.

FOURTH.—The opinion says, "Delays by the building contractors were unavoidable from the point of view of both parties to the contract in suit."

It does not appear in the record that the parties regarded delays by other contractors as unavoidable. The contract gives for the guidance of the contractor the dates on which the building contractors are to complete their work and says that his contract shall be completed on or before the "*contract date* for the completion of the build-

ing." The view set forth in the opinion would result in the instant contractor being without relief in case of delay by the building contractors even though the Government might have fully recovered its loss from the building contractors resulting from their delay!

It is true the contract contained a provision "Delays caused by acts of the Government will be regarded as unavoidable." This is contained in Paragraph 14 of the General Provisions, which must be read with Paragraphs 12 and 13. When so read it is perfectly obvious that delays caused by the Government are to be regarded as unavoidable in determining whether or not extensions of time will be given the contractor, and this is the only connection this clause has with the rest of the contract. Paragraph 14 purports only to contain the causes for which extensions will be allowed, which in Paragraph 12 are said to be "hereinafter enumerated."

II. General Rules of Construction.

While the findings of fact do not state that the contract itself was prepared by the Government, it is obvious that the Specifications (Record, p. 5) and General Provisions (Record, p. 19) which form part of the contract, and contain the clauses the interpretation of which is at issue, were prepared by the United States.

The recent case of *Reading Steel Casting Co.* v. *United States*, 268 U. S., 186, follows a long line of cases in holding that a contract with the United States is construable and the rights of the parties determinable on the same principles as if the contract were between individuals.

In harmony with the principle laid down in that case, it has been held that where one party prepares a contract and the language is ambiguous, the Court will give the

benefit of the doubt to the other party. This certainly does not seem to be done in the instant opinion.

Garrison v. *United States*, 7 Wall., 688;
United States v. *Newport News, etc.*, 178 Fed., 194;
Scully v. *United States*, 197 Fed., 327.

III. Conclusion.

Construction of the contract in the light of previous decisions does not permit the interpretation given in the opinion. The appellant should be permitted a rehearing.

Respectfully submitted,

C. NEAL BARNEY,
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES.

No. 122.—October Term, 1925.

H. E. Crook Company, Inc., Appellant, vs. The United States. } Appeal from the Court of Claims.

[January 25, 1926.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a judgment of the Court of Claims, taken under § 242 of the Judicial Code before that section was repealed by the Act of February 13, 1925, c. 229, § 13; 43 Stat. 936, 941. The claim is for damages due to delay in enabling the plaintiff to perform a contract. The Court of Claims held that the plaintiff waived any claim that it might have had by going on with the work without protest and without taking any steps to protect itself. 59 C. Cl. 593. The Government contends that by the terms of the contract it was not bound to pay damages for delay.

The contract was that the plaintiff should furnish and install heating systems 'one in the Foundry Building, and one in the Machine Shop at the Navy Yard, Norfolk, Virginia.' It allowed two hundred days from the date of delivering a copy to the plaintiff for the work to be completed. A copy was delivered on August 31, 1917, making March 19, 1918, the day for completion. But it was obvious on the face of the contract that this date was provisional. The Government reserved the right to make changes and to interrupt the stipulated continuity of the work. *Wells Brothers Co.* v. *United States,* 254 U. S. 83, 86. The contract showed that the specific buildings referred to were in process of construction by contractors who might not keep up to time. 'The approximate contract date of completion for the foundry' is stated to be March 17, 1918, and that for the machine shop, February 15, 1918. The same dates were fixed for completing the heating systems, but the heating apparatus had to conform to the structure, of course, so that if the general contractors were behindhand the heating

also would be delayed. They were behindhand nearly a year. When such a situation was displayed by the contract it was not to be expected that the Government should bind itself to a fixed time for the work to come to an end, and there is not a word in the instrument by which it did so, unless an undertaking contrary to what seems to us the implication is implied.

The Government did fix the time very strictly for the contractor. It is contemplated that the contractor may be unknown, and he must satisfy the Government of his having the capital, experience, and ability to do the work. Much care is taken therefore to keep him up to the mark. Liquidated damages are fixed for his delays. But the only reference to delays on the Government side is in the agreement that if caused by its acts they will be regarded as unavoidable, which though probably inserted primarily for the contractor's benefit as a ground for extension of time, is not without a bearing on what the contract bound the Government to do. Delays by the building contractors were unavoidable from the point of view of both parties to the contract in suit. The plaintiff agreed to accept in full satisfaction for all work done under the contract the contract price, reduced by damages deducted for his delays and increased or reduced by the price of changes, as fixed by the Chief of the Bureau of Yards and Works. Nothing more is allowed for changes, as to which the Government is master. It would be strange if it were bound for more in respect of matters presumably beyond its control. The contract price, it is said in another clause, shall cover all expenses of every nature connected with the work to be done. Liability was excluded expressly for utilities that the Government promised to supply. We are of opinion that the failure to exclude the present claim was due to the fact that the whole frame of the contract was understood to shut it out, although in some cases the Government's lawyers have been more careful. *Wood* v. *United States*, 258 U. S. 120. The plaintiff's time was extended and it was paid the full contract price. In our opinion it is entitled to nothing more.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.